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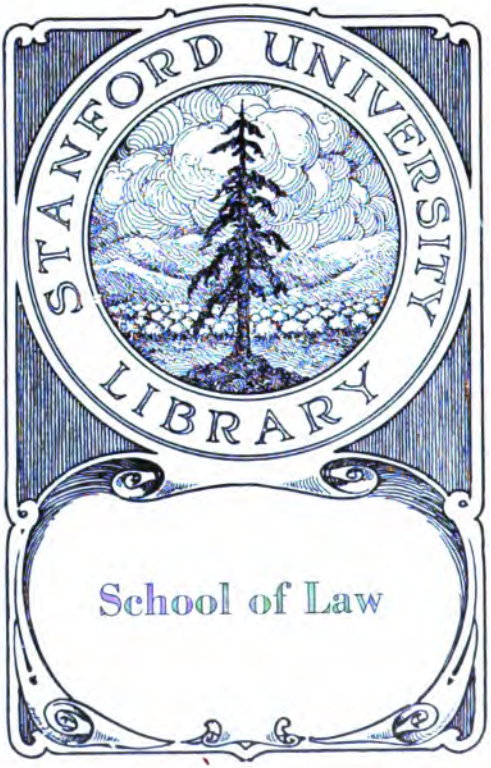
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'79B

THE CANADIAN LAW TIMES

Edited by

E. DOUGLAS ARMOUR, Q.C.,
Of Osgoode Hall, Barrister-at-Law.

VOL. XII.

TORONTO :
THE CARSWELL CO. (LTD.), PUBLISHERS,
1892.

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THE CANADIAN LAW TIMES.

JANUARY, 1892.

THE STATUTORY DISCHARGE OF MORTGAGE.

WE have on several occasions heretofore referred to the effect of the statutory discharge of mortgage as a re-conveyance. The recent cased of *Brown* v. *McLean* (*a*) aroused some comment and brought attention to bear upon this amongst other matters there involved. As the matter has received a good deal of consideration in England upon the effect of indorsed receipts on building society mortgages, we propose to make a collection of the cases bearing upon this form of re-conveyance.

What re-conveyance may be demanded.—It has been decided that a mortgagor is not bound to accept a statutory discharge, but may insist upon having a re-conveyance under seal with a covenant against incumbrances by the mortgagee (*b*). Proudfoot, V.C., said: "There is nothing in the statute compelling the mortgagor or his assigns to take such a certificate or depriving him of the right he had to a re-conveyance." The statute (*c*) declares that, "Where a registered mortgage has been satisfied, the Registrar, on receiving a certificate executed by the mortgagee, or if the mortgage has been assigned and the assign-

(*a*) 18 Ont. R. 533.
(*b*) *McLennan* v. *McLean*, 27 Gr. 54.
(*c*) R. S. O. c. 114, s. 69.

ment registered, then executed by the assignee, or by such other person as may be entitled by law to receive the money and to discharge the mortgage * * * shall register the same, * * * and the same shall be deemed a discharge of the mortgage, and the certificate so registered shall be as effectual in law as a release of the mortgage, and as a conveyance to the mortgagor, his heirs, executors, administrators, or assigns, or any person lawfully claiming by, through or under him or them, of the original estate of the mortgagor." The statute merely furnishes a new species of re-conveyance, and as Proudfoot, V.C., well says, "there is nothing in the statute to compel a mortgagor to forego a re-conveyance if he desires it."

What the certificate should recite.—The certificate naturally recites that the mortgagor has paid the mortgage money, and if the equity of redemption has not been assigned, and the mortgage is satisfied by the mortgagor that is strictly correct. If, however, the equity of redemption has devolved on the heir, devisee, executor or admintrator of the mortgagor, or has been assigned by him, the question arises as to whose name should be inserted in the certificate of discharge. That was what precipitated the case of *McLennan* v. *McLean* above cited. The assignee of the equity of redemption refused to accept a discharge which recited that the mortgagor had paid the mortgage money. Proudfoot, V.C., said: "The effect in this case of the certificate when registered, would probably be to vest the estate in the plaintiff, and as at present advised, I do not see that the receipt specifying the money to have been received from the wrong person could operate to the prejudice of the plaintiff, as it would not be evidence against him in any proceeding in which it might be necessary to show who paid the money."

In *Carrick* v. *Smith* (*d*), it appeared that the mortgagor had in his life time paid about three-fourths of the mortgage money, and his widow after his death on behalf of his

(*d*) 35 U. C. R. 348.

estate paid the balance. A discharge was obtained and registered reciting that the mortgagor had paid the mortgage money, and it was objected that the legal estate was still in the mortgagee. Wilson, J., delivered the judgment of the Court and held that the misrecital was of no consequence. Naming the person who paid the debt is not making and does not make that person the assignee or releasee of the estate.

The certificate was partly true, but the learned judge proceeded, "I am not certain whether a certificate omitting the payer's name altogether would not be sufficient. I see no reason why it should not be so. * * * We hold the certificate to be true in fact as to a very large portion of the debt, and to be sufficient in law on the declaration of the mortgagee that the mortgage because of the payments he has received 'is therefore discharged;' and that it has been duly discharged." It will be seen also from a perusal of the English cases which will be cited that the effect of the certificate is to vest the estate in the person best entitled to call for it. So that it is a matter of comparatively no importance whose name is inserted in the certificate or receipt.

Effect of discharge before registration.—It is the registration of the discharge that makes it operate as a re-conveyance. On its face and in its form it is a mere certificate that money has been paid on the mortgage and that the mortgage is discharged. "Having no effect upon the legal estate before registration," said Moss, C.J., in *Dilke* v. *Douglas* (*e*), "by that act it may be made to operate upon it." It has none of the elements of a conveyance. It is not even under seal. In *T. & L. Co.* v. *Gallagher* (*f*), the Master in Ordinary said, "the statutory discharge never having been registered, was in fact nothing more than a receipt for so much money paid to the Building Society. It could operate as a discharge of the mortgage, and as a re-conveyance of the estate of the mort-

(*e*) 5 App. R. at p. 70.
(*f*) 8 P. R. 97.

gagors, only by its registration; it did not until then release the mortgagor from any of the covenants contained in the mortgage." Again in *Re Music Hall Block* (*g*), Ferguson, J., said, "what is made tantamount to a re-conveyance is the certificate and the registration of it."

Thus before registration the discharge is a mere certificate of payment, or in other words, a receipt. In England the form of the statutory discharge is merely that of a receipt endorsed upon the mortgage deed. But it is given its operation by the statute when made, and does not depend upon registration or any equivalent for its operation as a conveyance.

Effect of discharge after registration—general principle.—The statute, which we have already cited from, indicates a variety of persons in whom we are to look for the legal estate. It names the mortgagor, his heirs, executors, administrators, or assigns, or any person lawfully claiming by, through or under him or them. The registered discharge is therefore automatic in its operation, and vests the estate in that person who is legally entitled to it. Just as, upon the death of an ancestor, the estate is cast immediately upon his heir, though who his heir may be may often be very difficult to ascertain, so the statutory discharge vests the estate in the person entitled thereto, though it may be very difficult at times to ascertain who that person is. Sir George Jessel, M.R., in dealing with an English Act of the same nature (*h*), remarked that the persons who framed the Act and copied into it sections from previous Acts had no precise idea as to what an equity of redemption meant; they no doubt thought it was very easy to find out, but, he said, it is not easy to find out at all. "The equity of redemption is sometimes vested in such a manner that until you get a decision of one or more Courts on a variety of obscure instruments, you cannot tell where it is; therefore it is simply a mistake to suppose it is a matter quite easy to find out" (*i*). And

(*g*) 8 Ont. R. at p. 228. (*h*) 37 & 38 Vict. cap. 42.
(*i*) *Fourth City, etc., Bd'g Soc'y* v. *Williams*, 14 Ch. D. at p. 145.

Lord Cairns in *Pease* v. *Jackson* (*j*) said that in determining who has the best equity to call for the legal estate there is "a very difficult problem indeed to be solved, and not a very convenient way for the Act of Parliament to have provided for the disposition of the legal estate—a disposition which very often could not be exactly determined except through the medium of a Chancery suit."

Where the mortgagor pays off the mortgage and there has been no disposition of the equity of redemption between the making of the mortgage and the discharge, there is no difficulty. But where complications arise it is sometimes, as has been said, difficult to ascertain where the legal estate should go and where it does go when the certificate is registered. We must first ascertain the meaning of the statute in naming the various persons in whom the estate may become vested by the discharge.

In *Carrick* v. *Smith* (*k*), Wilson, J., said, "The certificate will vest the estate in the person who has, subject to the mortgage, the right to the land." That is to say, whoever before the mortgage was paid off was owner of the land subject to the mortgage, or, in other words, whoever is owner of the equity of redemption, becomes invested with the legal estate. These words which are very rigid when compared with the language of some of the cases, must on their account be understood with express reference to the facts of that case, where the heirs at law claimed the estate by reason of their ancestor's mortgage having been discharged. No complication arose by reason of dealing with the equity of redemption. In *Brown* v. *McLean* (*l*), Street, J., said, "I should prefer in any event to give to the statutory discharge a more innocent effect than that of which it is suggested as being capable by the judgment in *Fisher* v. *Spohn*, (*m*), and to treat it merely as replacing the mortgagee's estate in the person best entitled to it, without allowing it to affect the real rights of any person." We may deduce from these *dicta* that the certificate, upon

(*j*) L. R. 3 Chy. at p. 582.
(*k*) 35 U. C. R. 348.
(*l*) 18 Ont. R. at p. 535.
(*m*) 4 C. L. T. 446.

registration, passes the legal estate to that person who is best entitled to call for it of all those whom the statute names.

It will be useful to look at the English decisions upon the English Acts and ascertain how the matter has been there treated. By 6 & 7 Wm. IV. c. 32, s. 5, it was enacted that it should be lawful for the trustees of a building society "to indorse upon any mortgage given by a member, a receipt for all moneys secured, which shall be sufficient to vacate the same, and vest the estate of and in the property comprised in such security in the person or persons for the time being entitled to the equity of redemption." Our enactment agrees in its two main features with this statute; it declares that the certificate, when registered, releases (the English Act says "vacates") the mortgage, and that the estate is re-conveyed to one of several possible persons, who must of course be the one best entitled to it, in which it agrees with the English Act.

By the 37 & 38 Vict. c. 42, when the moneys secured by a mortgage to a building society have been paid off the society may either indorse on or annex to the mortgage a re-conveyance "to the then owner of the equity of redemption," or may indorse thereon a receipt and "such receipt shall vacate the mortgage or further charge or debt, and vest the estate of and in the property therein comprised in the person for the time being entitled to the equity of redemption, without any re-conveyance or re-surrender whatever." There is no difference between this and the prior Act, and the decisions on both are of use in interpreting our own statute.

The purpose of these Acts is well explained in *Hosking* v. *Smith* (*n*). Lord Halsbury, L.C., said: "Apart from the consideration of authority I cannot myself entertain a doubt that all that the statute intended to do was to get rid of conveyancing formalities and to make the receipt given under the statute to operate as though it were a conveyance. * * * Doubtless in most cases this [the

(*n*) 13 App. Ca. 582.

owner of the equity of redemption] would be clear enough, but where a conflict arises I cannot doubt that the statute must have meant that the estate should vest in the person who has the best right to call for it." And Lord Watson, "I can discover in its language no indications of an intention on the part of the Legislature to alter the existing law or to affect the rights and interests *inter se* of mortgagors and mortgagees. It appears to me that the sole object of the Legislature was to provide a cheap statutory substitute for a re-conveyance of the legal estate, and that the indorsed receipt was meant to operate in favour of the person or persons who might at its date have the best right to a conveyance of the property mortgaged."

In *Pease* v. *Jackson* (*o*), Lord Cairns thought there was an obscurity in the Act, but that it must mean one of two things for the purpose of his decision. One, that if the mortgagor came to the society and paid off the mortgage and took an indorsed receipt, stating that he had paid it off, the property would vest in him, he being in one sense the owner of the equity of redemption. The other, that, no matter who paid off the mortgage, the indorsed receipt operated so that the legal estate went to whichever of all the persons entitled in any shape or form to the equity of redemption had the best equity to call for the legal estate. His Lordship thought that one of these constructions must be the right one, and he certainly thought that it could not be the correct construction to hold that if the mortgagor paid off the mortgage money and took an indorsed receipt, the legal estate *ipso facto* vested in the next equitable incumbrancer in point of time without regard to the question whether he had the best right to call for the legal estate.

The latter construction was preferred by Lord Justice Baggallay in *Robinson* v. *Trevor* (*p*), and by Lord Watson in *Hosking* v. *Smith* (*q*). In the latter case the learned Lord said, "I think the legislature, by the expression 'person or

(*o*) L. R. 3 Chy. at p. 582. (*p*) 12 Q. B. D. at p. 249.
(*q*) 13 App. Ca. at p. 589.

persons entitled to the equity of redemption,' meant to indicate that there might be persons other than the mortgagor who would be so entitled, and that its true interpretation must be reached, in cases like the present, by holding that the expression refers to the person or persons who at the time of the indorsement, have the better equity to call for the legal estate." In *Fourth City, etc., Building Society* v. *Williams* (*r*), Jessel, M. R., said that the person "for the time being entitled to the equity of redemption" was the same person as the "owner of the equity of redemption." The Society might re-convey to the owner, and the receipt must operate to re-convey to the same person. The owner is entitled to call for a re-conveyance, therefore the person entitled to call for the conveyance is the person in whom the receipt vests the property. The only difference between these statutes and our own is that whereas the English Acts speak generally of the owner of the equity of redemption, ours names those who might be owners. Consequently we may at present interpret the statute as investing with the estate the person who is best entitled to call for it by reason of some equity and not by reason simply of the priority of incumbrances, in point of time.

Applied cases.—We shall now illustrate by example the cases in which this principle has been applied.

In *Carrick* v. *Smith* (*s*), the mortgagor had paid part of the mortgage moneys, and after his death his widow and heirs at law paid the remainder. Held, that the discharge vested the estate in the heirs at law.

In *Fisher* v. *Spohn* (*t*), it appeared that in 1881, Smith mortgaged land to Fisher. In 1882 two executions against Smith's lands were placed in the Sheriff's hands. Afterwards, Smith sold the land to House, and in order to substitute House for Smith as mortgagor, Fisher took a mortgage from House and discharged Smith's mortgage. Patterson, J.A., said, after quoting the words of the statute, "The re-conveyance was, therefore, to House, and not to

(*r*) 14 Ch. D. 140.

(*s*) 35 U. C. R. 348.

(*t*) 4 C. L. T. 446.

Smith," and he held that the executions did not bind the land as against the new mortgage. The writer would have ventured the opinion that as Fisher was next entitled to the equity of redemption as second mortgagee and was claiming under House, the assignee of the mortgagor, Smith, the re-conveyance was to him.

In *Brown* v. *McLean* (*u*), the plaintiff advanced money to a mortgagor to pay off existing mortgages, and took a mortgage on the land. He then registered discharges of the mortgages which he had paid off. The defendant had during this time an execution in the Sheriff's hands against the mortgagor's land. Street, J., held that the plaintiff was entitled to be subrogated to the rights of the mortgagees, whom he had paid off, but remarked that the discharge vested the estate in the person best entitled to call for it.

In *Prosser* v. *Rice* (*v*), in 1844 a mortgage was made to a Building Society. In 1849, a mortgage was made to Mason. On 4th September, 1852, Beadle advanced money to the mortgagor upon loan, for which he was to receive a mortgage, to pay off the Building Society, which was done and a receipt indorsed on the mortgage. On 18th September, 1852, Beadle advanced the balance of his loan and a mortgage were taken. Held, that the legal estate vested in Mason by virtue of the indorsed receipt (*w*). This case was, however, overruled by the next cited case.

In *Pease* v. *Jackson* (*x*), Hood, in 1856, mortgaged to the Middlesborough Building Society. In 1857, he executed an agreement for a mortgage to Pease and Sharp for an advance, and notice was given to the Building Society. In 1860, Hood mortgaged to the Leeds Building Socicty, which paid the Middlesborough Society the amount of their mortgage, and a sum of £7 3*s*. in addition. The receipt was indorsed and the mortgage to the Leeds Society made

(*u*) 18 Ont. R. 533. (*v*) 28 Beav. 68.

(*w*) It will be observed that when Beadle advanced his money he had no conveyance and was not an assignee of the mortgagor, nor the owner of the equity of redemption.

(*x*) L. R. 3 Chy. 576.

at the same time, and the deeds were given up to the latter. Lord Romilly, who had decided *Prosser* v. *Rice* held that the legal estate vested in Pease and Jackson. But on appeal it was held that it vested in the Leeds Society, being the subsequent incumbrancer having the best right to call for the legal estate, to the extent of the money paid on the mortgage, but as to the £7 3*s*. that they came in after the mortgagees prior in point of time. On this latter point, *Hosking* v. *Smith*, cited below overruled this case.

In *Fourth City, etc., Building Society* v. *Williams* (*y*) the money of a second mortgagee was taken by the mortgagor and paid to a building society who were first mortgagees, and who indorsed a receipt on their mortgage. There were subsequent dealings with the equity of redemption, but it was held that the second mortgagee got the legal estate as he was the person entitled to call for it as his money paid off the building society. In *Marson* v. *Cox*, reported with the last case, fourth mortgagees, the persons who advanced the money to pay off the building society got the legal estate.

In *Robinson* v. *Trevor* (*z*), third mortgagees who advanced money to pay off the building society which held the first mortgage, got the legal estate to hold for the amount which they had advanced to pay off the first mortgage.

In *Sangster* v. *Cochrane* (*a*), the plaintiff advanced money at the request of the mortgagor to pay off a building society, the mortgagor having conveyed the land to the defendant who had no notice of the building society's mortgage. The plaintiff afterwards took a mortgage without notice of the conveyance to the defendant. Held, following the cases cited, that the plaintiff took the legal estate by virtue of the indorsed receipt. Kay, J., who decided the case did not agree with the previous decisions, but was of opinion that the receipt "vacating" the mortgage could not "assign" it; and further, that a stranger

(*y*) 14 Ch. D. 140. (*z*) 12 Q. B. D. 423

(*a*) 28 Ch. D. 298.

paying off the mortgage is not entitled to the equity of redemption. This case is like *Prosser* v. *Rice* where the mortgage was given to the person advancing the money after he had made the advance. If a mortgage were given before the advance would the learned Judge's remark have any weight? The last mortgagee would be the owner of the equity of redemption by assignment, and he would not be a stranger. Without a mortgage he would be in the position of the lender in *Imperial Loan and Savings Company* v. *O'Sullivan* (*b*), a stranger, but with one, he would undoubtedly be an owner.

In *Lawrence* v. *Clements* (*c*), it was held, following *Pease* v. *Jackson*, that an advance by a third mortgagee and an indorsed receipt put the third mortgagee in the place of the building society, first mortgagees, to the extent of the payment on the mortgage, but not for an additional advance though made at the same time. But this latter principle is denied in *Hosking* v. *Smith*, cited below.

In *Hosking* v. *Smith* (*d*), third mortgagees paid off a Building Society out of their advance, and the mortgagor received a large sum over and above the amount necessary to pay off the Building Society mortgage. The usual receipt was indorsed. It was admitted that, as to the amount paid to the Building Society the person who made the advance was first, and the dispute centred on his priority as to the additional advance. The House of Lords decided, overruling *Pease* v. *Jackson* and *Robinson* v. *Trevor* on this point, that the third mortgagee got the legal estate for all purposes, and he stood first as to his whole advance.

Much weight must be attributed to the fact that in the cases cited there was no notice of the intermediate mortgages, and that the title deeds were delivered to the person making the advance. Kay, J., said in *Sangster* v. *Cochrane* that notice or no notice could make no difference in the operation of the receipt. But it would make a difference as to the ranking for an additional advance.

(*b*) 8 P. R. 162. (*c*) 31 L. T. N. S. 670.
(*d*) 13 App. Ca. 585.

Under our system of registry, a third mortgagee paying off the first and taking a discharge would be entitled to hold the legal estate only for the amount paid on the first mortgage.

Discharge by executors or surviving mortgagee.—In *McPhadden* v. *Bacon* (*e*) Vankoughnet, C., doubted whether a discharge of a mortgage executed by one of two executors was valid. The circumstances of that case, however, were peculiar. The executor who signed the discharge was also mortgagor. In *Ex parte Johnston* (*f*), the Referee, after consultation with Blake, V.C., held that a discharge executed by two out of three executors was valid by virtue of the Act which is now R. S. O. cap. 110, sec. 17, and enacts that "every certificate of payment or discharge of a mortgage * * by the mortgagee or his assignee, his heirs, executors, administrators, or assigns, *or any one of them*, * * shall, if in conformity with *the Registry Act*, be valid to all intents and purposes." This is not generally accepted in practice, however, though it is hinted that it would be good in *Dilke* v *Douglas*, cited below.

In *Beaty* v. *Shaw* (*g*) one executor mortgaged land to the other to secure money due the estate of which they were executors. The mortgagee executor died and the mortgagor executor executed a discharge of his own mortgage, and the present Chancellor held it invalid, saying that the Registry Act contemplated a person to pay and a person to receive, and the transaction could not stand.

By statute (*h*), the payment to a surviving mortgagee absolves the mortgagor from seeing to the application of the money. In *Dilke* v. *Douglas* (*i*), it was held that a discharge given by a surviving mortgagee upon payment in money of the mortgage debt, effectually discharges the mortgage and revests the estate. But the payment must be a money payment and not the substitution of something else for the mortgaged land. But a purchaser who has no notice of such a substitution may treat the discharge as valid, and as against him it will be good.

(*e*) 13 Gr. 591. (*f*) 6 P. R. 225. (*g*) 13 Ont. R. 21.
(*h*) R. S. O. c. 110, s. 8. (*i*) 5 App. R. 63.

Discharge of mortgaged estate tail.—In *Lawlor* v. *Lawlor* (*j*), it was held that where a tenant in tail made a mortgage in fee simple, which had the effect of barring the entail and conveying a fee simple to the mortgagee, and the mortgagee executed a statutory discharge of mortgage which was registered, it had the effect of re-conveying the land in fee simple.

Discharge of a derivative mortgage.—When a mortgagee assigns his mortgage subject to redemption, and so creates a sub-mortgage, or derivative mortgage, it is doubtful whether the statutory discharge is proper. The safest plan is for the derivative mortgagee to re-assign to the mortgagee, and the latter may then execute a statutory discharge, or the derivative mortgagee may re-convey to the mortgagor with the mortgagee's assent.

(*j*) 10 S. C. R. 194.

THE PERSONAL EQUATION.

The involuntary variation from accuracy to which the astronomer is liable can be estimated, and simple addition or subtraction corrects his observations; the litigant is not so fortunate. Apart from the circumstance that the process of correction is neither simple nor inexpensive, and the involuntary variation unsusceptible of nice estimation, there is another application in the sphere of law of the personal equation where the variation can scarcely be classed as involuntary. It is a bias or tendency in a certain direction, *e.g.*, for or against a mortgagee, a corporation or a creditor, and whatever its origin it may be accepted as a fact of human nature.

Where in matters of law the judicial mind has such a trend, and determines in accordance with it, an opportunity of correction is usually accorded the litigant and (to ride the metaphor hard) the chance is great that the observers of more elevated station (whether three, four or six in number) will discern the deviation from rectitude and report accordingly.

In the lesser—and, as some would say, altogether insignificant- -sphere of practice the case is largely otherwise, and a bias, either unconscious or openly stated and acted on, is frequently brought to bear upon matters unappealable, and finally determines the rights of the parties or at least influences such determination. Even if there be an opportunity of review, it is ultimately not infrequently discovered that the variation is "an exercise of discretion"—and to be respected accordingly. One may therefore conclude that in matters of practice it is especially desirable to reduce the personal equation to a mininum. But is it worth while to give serious and patient attention to matters so trivial?

Take a case.

A. sues B. upon notes to the amount of $2,000. Believing that there is no defence, and knowing that B. is every day putting his property beyond a creditor's reach, A. moves for judgment. Upon the motion B. manages in his affidavits to outline a shadowy defence which he swears to with vigour in inverse ratio to its substantiality. X., who hears the motion, has a bias (unconscious) in favour of debtors, and an announced preference for giving to every man the privilege of a trial in Court.

He dismisses the motion. The result to A., a possible loss of his claim and of the costs of his action which it may not be worth while to prosecute further. He takes an appeal as a forlorn hope, and is cheered by a statement of the Court *in banc* that it would probably not have seen things in the same light as X., but that a discretion has been exercised which should not be disturbed.

Or the converse case.

B. swears to a good defence, and outlines it. Y. hears the motion. All his yearnings are for unfortunate creditors, and besides he considers that he must be "satisfied" that there is a good defence. He practically tries the case, is not "satisfied" to the degree of demonstration, gives A. judgment, and B. is ruined. Should this again be appealed, the same degree of consolation and relief may be administered.

Is it then so unimportant that the practice in this regard should be carefully and uniformly construed?

Both of these actions might have gone to trial had the element of urgency been lacking, and although no whit more important in this guise, they would then have been dealt with and disposed of with deliberation and solemnity, and might have been carried forward in the same spirit so long as the litigants desired and their purses permitted.

Even the most trivial matters of practice may have a bearing of the utmost importance upon the action in which they arise, and therefore the litigant may not unfairly claim

in respect of them that they shall be determined in strict accordance with rule and authority. If this be not done, the solicitor is hopelessly at sea in advising his client.

Is it questioned that dissimilar views are constantly held and given effect to?

An example or two will establish the point. It is written in the Reports that "the practice of the Court is the law of the Court," but is it not again written (this time in the hearts of solicitors) that in other quarters the rules are considered merely to give convenient general indications of the manner in which actions should be conducted, and of the times when certain things should be done, but do not bind the Court or the parties, and if transgressed through ignorance or carelessness the offender can readily set himself right (he is not really wrong). Only in a very extreme case indeed will he be at the pain of paying costs.

Now both conceptions of the method in which the practice should be administered are intelligible,—the first is strict, but gives the diligent and skilful solicitor a surely not unreasonable advantage; the second inclines to put a premium upon ignorance and slovenliness,—but how shall they be reconciled?

Oddly enough it is in the Western wing of the Hall that times and seasons and days and years are observed with such close attention, and in the former home of truly inelastic practice that the easier doctrine prevails.

For the Sittings of the one Divisional Court serve your notice of motion a day late, and lucky you will be to get your case upon the list under penalty of the costs of a special motion. Should the same mischance befall you elsewhere, fear not, for no bogie of "at least eight days" will be allowed to disturb the majestic march of justice.

If such a broad difference exists as to the whole theory of the application of the rules, it is not to be wondered at that an equal diversity prevails in details. The most striking differences are (perhaps fortunately) not perpetuated in the reports, but a knowledge of them is not the least important part of the stock-in-trade of the Osgoode Hall practitioner.

Take pains to note a few of the remarks that one cannot help hearing in the court rooms and corridors. Young *Ex Parte*————, who has just failed in an earnest attempt to change a venue, is asking his older friend————Q.C., for advice. Why in the world is the first question of———— Q.C., "what Division is your case in?" before his young friend has been able to unbosom himself of the bare outline of his motion. It is because there is an element governing the chance of success of an appeal which it is more important to consider than facts or authorities?

X———, J., is utterly uninfluenced by the fact that the question brought before him by way of review has been passed upon before,—possibly even there is a gentle *prima facie* leaning towards the view that the order he is asked to correct is wrong.

Y——, J., on the contrary, holds much by the discretion of the Officer appealed from, and to him, therefore, no appeal goes where the appellant can help. Z——, J., upon this question of venue, takes the ground that the plaintiff is *dominus litis*, and can, to some extent, follow his own pleasure, or possibly it is the argument from the balance of convenience and saving of expense that most powerfully influences him, or he may consider the only really important consideration to be the place where the cause of action arose.

The crafty Q.C. is not ignorant that even upon this minor point these dissimilar views are held. Hence his question and such remarks as the following:—

"If you want to quash a conviction on that ground your only chance is——."

"There is no use in moving for a receiver before——."

"——will never appoint an administrator *ad litem* under those circumstances."

"Hold your motion for past maintenance till next week."

"You ought to have issued your writ in the —— Division."

"That objection will not go down there. Pity you had not——."

It cannot be gainsayed that such irreverent statements are made, and not idly or in jest. That there should be a foundation for them is a matter of regret, and not merely because consistency is a jewel, and an accurate and scientific administration of the practice a thing pleasing to a well ordered mind.

Uncertain delay and pecuniary loss result from such a state of affairs, and the litigant and his solicitor suffer to an extent difficult to measure but distinctly and painfully appreciable.

An English Judge has expressed himself strongly upon this subject, and it is not out of place here to quote his language. In *Re Hotchkiss Trusts* (*a*), Sir W. M. James says: "I do not think it seemly that two branches of a Court of co-ordinate jurisdiction should be found coming to contrary decisions upon similar instruments, and encouraging as it were a race, by inducing persons who wish for one construction to go to one court, and those who wish for another construction to go to another."

There is small object in querulous complaints where no amelioration is possible, but the remedy in the present case seems to be obvious. If the routine of litigation were brought under the influence of a single personal equation instead of many, there is little doubt that litigants and solicitors alike would be gainers. The question of the appointment (or assignment) of a single practice Judge for all Divisions does not seem to have been sufficiently considered from this point of view. Is not something beyond the mere convenience of the Judges at stake? Even looking at the matter in this light there is a good deal to be said in favour of weekly sittings by one Judge in all the Divisions, but if the Bench does not object to the waste of power involved in the present arrangement, that is primarily its affair.

Upon other aspects of the question there is much that is worthy of attention. It is a serious inconvenience that

(*a*) L. R. 8 Eq. at p. 647.

there is only one sitting of Chambers in the Chancery Division every week. Also that Tuesday is the only day set apart for several kinds of urgent motions, *e.g.*, for Injunctions, Receivers, etc., Also that motions for speedy judgment can nominally only be heard on Wednesdays. Also that during the last three days of the week it is only as a matter of grace that one can obtain the intervention of this Court at all where some important necessity for doing so arises. It is well that things should be done decently and in order, but unfortunately persons endeavouring to defraud their creditors, are just as likely to require the restraining influence of a capias or an injunction on the last three as on the first three days of the week. Were the Judge of the week in his room during business hours upon the days when Court does not sit, and if pressing motions were allowed to precede the paper on paper days, the difficulty would be much lessened; but it happens that two of the Judges of this Division do not live in Toronto, and it is therefore sometimes found cheaper and quicker to issue a new writ than to go to Hamilton or London to invoke the assistance of Equity. Again, it is unnecessary and inconvenient to have two Courts sitting on Tuesday. It is expedient (passing to the other side of the Hall) to intermingle indiscriminately on the paper lengthy appeals and ordinary routine Court work. It is unfair to postpone the hearing of Chamber motions until after the sittings of the Court is over and the Chamber appeals are disposed of.

On one occasion, a couple of years ago, five consecutive Chamber days passed without Chamber motions proper being reached at all, and on every recurring Chamber day the difficulty exists of estimating the length of time that the Court business will occupy. Court and Chambers have been known to be over before 10.30 a.m. On the other hand it frequently happens that Chamber business is not taken up until late in the afternoon. The intervening time represents a great many weary hours lost by practitioners in kicking their heels about the Court rooms.

The plan of the Chief Justice of the Queen's Bench Division of holding Chambers on a different day from Court, works most satisfactorily, and is at least one step in the right direction.

Is it then too much to say that reforms are urgently needed, and that the profession (who are the guardians of the interests of the public) are entitled to demand them.

These reforms are :—(1) A more consistent exposition of the practice (be it rigorous or liberal). (2) More frequent sittings of Court and Chambers arranged to meet the convenience of those whose convenience best deserves to be consulted, and adapted to the needs of the city which is the legal centre of the Province and itself a metropolis.

ANONYMOUS.

EDITORIAL REVIEW.

The Late Sir Adam Wilson.

The sudden death of Sir Adam Wilson, late Chief Justice of the Queen's Bench Division of the High Court of Justice, Ontario, and President of the High Court, has taken away a man who distinguished himself in all the various situations in which he was placed. At the Bar, in municipal politics, as a member of Parliament, Solicitor-General of the Province of Canada, and on the Bench, he deservedly acquired the greatest respect and admiration, for his industry, ability, and high character.

As a Judge he was remarkable for the greatest painstaking and industry. His judgments display the most exhaustive research in every case that came before him. In questions affecting municipal matters his opinion was of peculiar value on account of his practical experience in the working of the Municipal Act; but in all branches of law alike did it command the greatest respect.

He was the object, at one time, of a very violent attack by one of the political newspapers of this Province, and the motion against the writer will long be remembered, bringing out as it did a defence in person by the defendant which was vigorous and able enough to divide the Court equally, in consequence of which the rule dropped.

Upon his retirement from the Bench he did not retire from active pursuits, but engaged actively in the duties of a Bencher of the Law Society, his position as a retired Judge giving him *ex officio* a right to a seat in convocation.

The Late Judge Sinclair.

The death of Judge Sinclair, Judge of the County Court of the County of Wentworth, removes one of the best known of the County Judges of Ontario. His judgments always commanded respect, and his works on the Division Courts Act and its amendments, and the Absconding Debtors Act are constantly consulted upon points arising on those Acts, and no doubt his recent work on the Liquor Laws will also be found useful.

BOOK REVIEWS.

A Compendium of the Law of Property in land. By WILLIAM DOUGLAS EDWARDS, LL.B., of Lincoln's Inn, Barrister-at-Law; formerly London University Law Scholar and holder of the Inns of Court studentship. Second edition. London: Stevens & Haynes, 1891.

The second edition of this valuable treatise, following so closely upon the first, proves its use to the profession. The recent changes are introduced and a re-arrangement of some parts has been made. An estimable feature of of the new edition is the division into sections with catchwords in black-faced type which greatly facilitates references.

The Principles of the Common Law. Intended for the use of students and the profession. By JOHN INDERMAUR, Solicitor, author of "Manual of Practice," "Epitomes of Leading Cases," "Manual of the Principles of Equity," etc. Sixth edition. London: Stevens & Haynes. 1891.

Mr. Indermaur's success as an instructor is apparent from the popularity of his works, and their wide and rapid circulation. His compendium of the Common Law is concise, modern, and free from the impervious character of some works whose chief feature is the condensation of a large amount into a small space.

REVIEW OF EXCHANGES.

American Law Review.—May-June, 1891.

The Roman Advocate, by CHAS. E. FENNER.

How Far it is Safe for Citizens of One State to Organize a Corporation in Another State to do Business at Home? by GEORGE A. O. ERNST. Many companies are incorporated in one state by inhabitants of another to do business in the latter, and doubt is thrown on the power to so incorporate.

Reforms in Land Transfer, by Prof. HARVEY B. HURD. A report on reform in land transfer.

English Legal Affairs, by G. H. KNOTT. An account of the system of legal education and some other current legal matters in England.

The New Orleans Mafia Case, by ROBERT H. MARR, JR. An account of the Mafia tragedy and trial.

Ibid.—July-August, 1891.

Law Reform in the United States and its Influence Abroad, by DAVID DUDLEY FIELD. A sketch of the growth of the N. Y. Code of Procedure, the parent, it is said, of the Judicature Acts, and other matters.

The Construction of the Fourteenth Amendment, by CHARLES R. PENCE.

Wife-beating and Imprisonment, by IRVING BROWNE. An examination of English and American authorities on the husband's rights over his wife, excited by the Clitheroe case. The learned writer concludes, (1) By the *law* of England the husband never had any right to chastise his wife for any cause, except self-defence. (2) In the United States he never had any such *right*, except in Mississippi, and he never had the power except there and in North Carolina, and he now has neither the right nor the power anywhere. (3) In England the husband never had the right to imprison his wife for merely refusing to live with him, in the absence of positive misconduct on her part. (4) In the United States he never had any such right under any circumstances.

Liability for Losses and Injuries to Passengers in Sleeping Cars, by LUCIUS W. HOTT. The learned writer concludes from the authorities that a railway company is liable as a carrier for loss or injury to passengers in sleeping cars, whether arising from its own

negligence or that of the sleeping car company, and for the wilful or malicious acts of the servants of either company. A sleeping car company must use reasonable care to prevent injury and loss; the fact of loss will not raise a presumption of negligence, but slight evidence is enough. It is also liable for the wilful and malicious acts of its servants, and will probably be held to the same degree of care to prevent injury as a carrier of passengers would be.

The State and Private Corporations, by ROBERT LUDLOW FOWLER. A plea for more rigid control of corporations as distinct from the individual members, and for subjecting them to criminal responsibility.

Municipal Ordinances for the Regulation of Occupations by Means of Licenses, by WM. L. HODGE. The subject is considered under the following principal heads:—Ordinances (*i.e.*, the licences required by them) should not indirectly be regulations of interstate commerce. They must not directly or indirectly contravene the general statutes of the state. They must act impartially and with uniformity. They must be reasonable and not oppressive in their operation.

Criminal Law Magazine.—January, 1891.

Criminal Liability of Interstate Agents for the Violation of State License Laws, by D. H. PINGREY.

The Legal Culpability of the "Criminal Insane," by HENDERSON M. SOMERVILLE. A short article advocating that the test should be the possession of power to adhere to right and avoid wrong.

Ibid.—March, 1891.

Homicide Committed in Making an Arrest, by W. W. THORNTON. Continued and concluded in May and July numbers. A very exhaustive article dealing with the subject in all aspects and with great detail.

Ibid.—May, 1891.

The Doctrine of Marital Unity in the Modern Criminal Law, by LOUIS RICHARDS. The subject is considered under the following heads:—Criminal responsibility *inter se*. Competency to testify. Wife's responsibility for crimes against others.

Ibid.—July, 1891.

Rape, by D. R. N. BLACKBURN.

Ibid.—September, 1891.

The Power of the Sovereignty to Regulate the Conduct of Citizens towards each other, by D. H. PINGREY. The various sumptuary laws are reviewed, both those of England and those of the United States. Such laws in the latter country are usually held to be unconstitutional, except where the business undertaken and regulated partakes of a public nature, and entitles the public to some measure of protection.

Charles Farley Harris,
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THE CANADIAN LAW TIMES.

FEBRUARY, 1892.

DISCOVERY IN ONTARIO SINCE THE JUDICATURE ACT.

THE reported decisions under the Ontario Judicature Act and Rules up to the present time on this branch of practice are sufficiently numerous, and, as to the various rules and principles involved, sufficiently comprehensive, to invite an attempt at classification. Such an attempt will, it is apprehended, need less apology than an article taking a wider range, and embracing English and other cases; while at the same time many of those cases necessarily come into prominence in the decisions of the learned judges in the cases here classified.

Methods of Discovery.—The practice provides for two methods of discovery; first, by production of documents; and second, by examination of the party (*a*). The rules by which this practice is now provided have been referred to by the learned Judge who decided *The Union Bank* v. *Starrs* (*b*) as "two groups of rules, 487 to 506, and 564 to 575."

Stage of Action.—It was said in *Tilsonburg Manufacturing Co.* v. *Goodrich* (*c*) that the former Chancery practice as to the stage of the cause at which examination of parties might be had, was still in force; and was

(*a*) *Per* Boyd, C., in *Lavery* v. *Wolfe*, 10 P. R. 488.
(*b*) 13 P. R. 108.
(*c*) 10 P. R. 327.

applicable to all Divisions of the High Court. It had been previously held (*d*) that the former Chancery practice should apply to actions in the Chancery Division, as to examinations for discovery.

Under the General Orders of the Court of Chancery (*e*) a plaintiff might be examined at any time after answer; and a defendant at any time after answer, or after the time for answering had expired.

As to the reason for the period at which the examination of a defendant may be had, being fixed to be after the delivery of the statement of defence, or after the expiry of the time for such delivery, the learned Judge who decided *Campbell* v. *Scott* (*f*) says:—"Two main reasons occur to me: one is that it is more convenient to allow an examination for discovery at that stage of the proceedings; and, secondly, that the statement of the plaintiff's cause of action upon the record is evidence of *bona fides*. If, however, the *bona fides* is made to appear by affidavit, and it appears to be more convenient to allow the examination for discovery prior to the delivery of the statement of claim, I see no reason why the examination should not then take place. It must be a question of convenience," and "If it is more convenient, then it falls within that qualification of Rule 566, which allows it, where it appears necessary for the purposes of justice."

Passing over the ordinary proceeding of examination for discovery after defence due, provided by Rules 487, 489 (*g*), to that which has been called the "extraordinary proceeding" (*h*) of examinations at any stage of the cause 'where it shall appear necessary for the purposes of justice,' provided for in Rule 566, it may be observed that the earliest reported case under Rule 566, appears to be *Fisken* v. *Chamberlain* (*i*). In that case the learned Chancellor

(*d*) *Davis* v. *Wickson*, 9 P. R. 219 (1882).
(*e*) G. O. 140.
(*f*) 14 P. R. 203.
(*g*) Corresponding with Chancery G. O. 138, 140.
(*h*) *Hooey* v. *Gilbert*, 12 P. R. 114.
(*i*) 9 P. R. 284 (1882).

says of the Rule just referred to, that "It is to all intents as to this Province a new provision; there is no antecedent legislation or practice, which requires that any curtailed meaning should be given to it. On the contrary it is to be regarded as a remedial provision, and should receive a fair, large, and liberal construction, such as will best ensure the object of the rule: R. S. O. c. 1, s. 8, s-s. 38, and this at any stage of the cause where it shall appear necessary for the purposes of justice." His Lordship cites the observation of Jessel, M.R., in *Warner* v. *Mosses* (*k*) that "it"—(a like rule in England)—"does extend, no doubt, as it says, to all cases where it shall appear necessary for the purposes of justice,'" and also notes other English cases on the rule in question. In *Fisken* v. *Chamberlain*, the application was before appearance and on a pending motion for injunction; and, as stated in the judgment, "with a view to discover the particulars, and counteract the influence, of an alleged fraudulent disposition of the property in dispute, pending the action to a person unknown to the plaintiff,—a state of facts not negatived by the defendant implicated therein, who moves against the order," and the appeal from an order of the learned Master in Chambers granting the discovery was dismissed.

Whether for discovery or otherwise such examination will only be allowed, under exceptional circumstances, and where it shall appear necessary for the purposes of justice (*l*). But where such circumstances are shown, and the Court is satisfied that it is in the interests of justice, such examination will be allowed not only to the defendant for the purpose of enabling him to obtain information of facts upon which to frame his defence, but even to the plaintiff to enable him to frame his statement of claim. The important distinction drawn by the learned judge who decided *Hooey* v. *Gilbert* (*m*) may here be noted, viz:—that "the position of a person defending a claim as to which he has no personal knowledge, and of a plaintiff advancing a claim

(*k*) L. R. 16 Ch. D. 100.
(*l*) *Thompson* v. *Gye*, *infra*.
(*m*) 12 P. R. 114.

of which he has no knowledge, are in most cases vastly different."

Discovery before statement of claim.—After *Fisken* v. *Chamberlain* the four following cases further illustrate the rule when invoked by the plaintiff before statement of claim. In some of them, as will be seen, the discovery sought was allowed, in others disallowed.

Gordon v. *Phillips* (*n*) was a case where it appeared that a bank (the Standard Bank) in the year 1883, established an agency at Brighton with the defendant as agent, and plaintiff as solicitor and notary, under B., the manager of the bank at Toronto. In 1885 defendant dispensed with the services of plaintiff and gave the business to G. The writ was endorsed with a claim for damages for libel and slander. Upon an affidavit by plaintiff, uncontradicted, setting out the facts, and showing a good cause of action, and that he was unable to frame his statement of claim unless he could examine the defendant and his employee B., between whom correspondence had taken place relating to the matter upon which the claim was founded, it was held that the plaintiff was entitled to such discovery under Rule 285 (now 566), the learned Chief Justice observing, that *Fisken* v. *Chamberlain* was a clear authority for such an order, and referring also to other cases.

Hooey v. *Gilbert* (*o*), was a creditor's action to set aside as fraudulent a conveyance made by the defendant R. to the defendant G. An *ex parte* order had been obtained by plaintiff under Rule 285 (now 566), on affidavit, for the examination of the defendants before statement of claim, which was appealed from, and the appeal allowed; Rose, J., observing that, "unless one assumes that the defendants have been guilty of fraud, such an enquiry before statement of claim would seem unreasonable. As no such assumption can be made, I think before the plaintiffs are permitted to put the defendants to the annoyance and loss of time consequent upon an examination, they must file and serve their statement of claim. It may be upon the

(*n*) 11 P. R. 540 (1886). (*o*) 12 P. R. 114 (1887).

facts admitted in the statement of defence, if any be filed, that no necessity for examination will arise, or it may be that no defence will be made."

McNally v. *McDonald* (*p*), was an action for a partnership account, and to have a deed of dissolution set aside; and an order, obtained by the plaintiff, requiring the defendant and one T., his bookkeeper, to attend for examination before delivery of statement of claim was appealed from, and the learned Judge, in allowing the appeal, said that "the plaintiff should have shown at least two things: 1st, that he had a good cause of action, and 2nd, that for want of the particular information, he was not able to frame his statement of claim, and that the examination of the defendant was absolutely necessary, in order to afford the information required, which he had not shown."

In *Thompson* v. *Gye* (*q*), which was an action for damages for breach of an alleged contract, one of the grounds upon which the plaintiff endeavoured to sustain, on appeal, a chamber order obtained for a foreign commission for examination of defendant before statement of claim, was that until such examination, the plaintiff could not draw his statement of claim. In allowing the appeal, the learned Judge (Street, J.), observed that "it would be a dangerous precedent to establish, that a party to an action is to be entitled to examine the other without some very strong reason for it before the defence is due. Such reasons were held to exist in *Gordon* v. *Phillips*, 11 P. R. 540, and the cases there cited; but an order for an examination at any earlier stage, whether for discovery or otherwise, should only be granted under exceptional circumstances, and where absolutely necessary in the interests of justice."

Henderson v. *Blain* (*r*), was also a case in which discovery before statement of claim was sought, but its decision turned upon another rule of practice. It was an action by certain shareholders of a bank which was in liquidation,

(*p*) 9 Occ. N. 54 (1889).
(*q*) 13 P. R. 273.
(*r*) 14 P. R. 308 (1891).

suing on behalf of themselves and all other shareholders, against the individual directors of the bank for negligence and misfeasance causing loss to the shareholders. The bank was made a defendant because its presence before the Court was deemed necessary, but no relief was asked against it. The plaintiffs applied for leave to examine H. L., one of the liquidators, for discovery. The learned Chancellor, on appeal, said that "the rule of Court was, that the official liquidator could not, as an officer of the Court, be called upon to make discovery, unless where he represents the company as a party litigant. The bank was passive and declined to litigate, and was made a defendant rather in order that the litigation might be final as against all in whom a right of action existed, than because its attitude was militant as to either the plaintiffs or the co-defendants. The liquidator has no independent knowledge even as a witness, but had acquired information in the course of the winding-up, which, it was supposed, would enable the plaintiffs forthwith to frame their pleadings. But this merely economic reason would not justify a new practice under Rule 566."

ALFRED HOWELL.

TORONTO.

(*To be concluded*).

ADMIRALTY JURISDICTION IN ONTARIO.

On the second day of October, A.D., 1891, the Maritime Court of Ontario ceased to exist, receiving its death blow from "The Admiralty Act, 1891," which came into force on that date, in pursuance of a proclamation in the Canada Gazette. The Act was passed in pursuance of "The Colonial Courts of Admiralty Act, 1890," 53-4 Vict. c. 27 (Imp.) which provided that the Legislature of any British Possession might by any Colonial law declare any Court of unlimited civil jurisdiction (meaning thereby unlimited as to the value of the subject matter at issue, or as to the amount that may be claimed or recovered), to be a Colonial Court of Admiralty. The Exchequer Court of Canada, being a Court which in Canada possesses the required jurisdiction, has by the Admiralty Act of last session been declared a Colonial Court of Admiralty.

The jurisdiction of such a Court is declared by the Imperial Act to be "*over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise,*" and by the Canadian Act it is declared (sec. 4) that such jurisdiction shall be exercised by the Exchequer Court "*throughout Canada and the waters thereof, whether tidal or non-tidal, or naturally navigable, or artificially made so.*" The Vice-Admiralty Courts Acts of 1863 and 1867, 26 Vict. cap. 24 and 30-31 Vict. cap. 45 (Imp.) are wholly repealed, and to ascertain the extent of the new jurisdiction of the Exchequer Court, reference must be had to the Statutes declaring and extending the jurisdiction of the High Court of Admiralty in England (especially 3 and 4 Vict. cap. 65 and 24 Vict. cap. 10), and the reports and text books in which English Admiralty law and practice are illustrated and defined. "The Colonial Courts of Admiralty Act" provides that any enactment in an Imperial Act referring to the Admiralty jurisdiction of the High Court in England, when applied to a Colonial

Court of Admiralty in any possession, shall be read as if the name of that possession were therein substituted for "England and Wales." It would therefore appear that the Admiralty jurisdiction of the Exchequer Court extends to questions of title arising in causes of possession, salvage, damage, wages or bottomry (3 and 4 Vict. cap. 65, sec. 3); to any claim in respect of a registered mortgage whether the ship or its proceeds be under arrest or not (24 Vict. cap. 10, sec. 11); claims for damage to cargo imported where no owner is domiciled in Canada (24 Vict. cap. 10, sec. 6); and the Court has also the power of ordering sales and prohibiting transfers of ships, conferred by sections 62-5 of the Merchant Shipping Act, 1854 (24 Vict. cap. 10, sec. 11).

The Dominion is to be divided into Admiralty Districts, and the Province of Ontario will be one of them under the name of "The Toronto Admiralty District." The Judge of the Maritime Court of Ontario is made a local Judge of the Exchequer Court in Admiralty, and the Registrar and Marshal of the Maritime Court are transformed into the like officers for the Toronto Admiralty district. The procedure and practice (including fees and costs) of the Maritime Court are adopted for this District. The limitation of ninety days for enforcing rights *in rem* against a *bona fide* purchaser or mortgagee of a ship, and the protection of mortgages registered prior to 1st October A.D. 1878, provided for by the fifth and six sub-sections of the fourteenth section of "The Maritime Court Act" (R. S. C. cap. 37), are also preserved and adopted.

During its brief existence the Maritime Court of Ontario entertained many causes of importance, and afforded relief to persons aggrieved who but for its existence would have gone without remedy.

The temporary decay of Canadian shipping on the lakes has diminished the volume of business, but there is every reason to anticipate a great development of this trade in the near future.

R. GREGORY COX.

St. Catharines.

THE IMPORTANCE OF GRAND JURIES.

After the usual formalities in their presentment, the Grand Jury at New Westminster made the following observations, which distinctly show the importance which they attach to their office, as one originating with the people, and standing between themselves when accused and the officer representing the Crown :—

"In a conscientious discharge of our duties, we beg to draw your Lordships' attention to the following facts which have presented themselves to us during the Assizes, and while we do not wish to insinuate neglect of duty on behalf of those representing the Crown, yet the position which some affairs have taken in the administration of criminal law has produced universal discontent in the minds of the public whom, we suppose, we represent, as they are the source from which the public institutions of our Province are maintained, and firstly:—We heard witnesses in the Cyrs assault case, and were unanimous in our opinion that this man who had made himself notorious by his brutal assaults and outrages against the public had committed a most heinous and aggravated assault, unprovoked, and in a most malicious manner. We found a true bill against him, and to our surprise the Attorney-General withdrew the prosecution for reasons only known to himself. This action on the part of the Attorney-General, his disregarding the wishes of the Grand Jury, and his inexplicable excuse to refer the matter to a magistrate, has, with an intimation that he did not consider it a serious offence, created surprise in our minds. We desire to express our regret that this case as it was presented to us should not have come before the Court, as we are certain that justice would have been meted out by the infliction of a heavy sentence.

We also beg to bring strongly under your Lordships' notice that the two prisoners, Devine and Wilkinson, who are charged with poisoning, have been incarcerated for eight months, and to ask whether a presentment of a bill to the Grand Jury can be postponed as it has been done by the Crown prosecutors? Our attention was drawn to these men in the Provincial gaol, and we could not help seeing the severe punishment they were undergoing, which, together with the suspense their minds are being subjected to, is destroying the prisoners' health. We judged that men had a right to be brought to trial or discharged under the circumstances, and we feel it our duty to point the condition of affairs out to you, and ask in the name of justice if these men cannot be tried, and that prison discipline be relaxed until the Attorney-General, or some one of the many assistants who were present during the Assizes, find time to present the case to the Crown.

We hope that we are not exceeding our privileges when we request that Samuel Greer be not sent to the penitentiary until the application for a new trial is disposed of, as it is in our minds quite clear that the verdict of the petit jury was caused by a misunderstanding, and they were unanimous in desiring a verdict for common assault.

We would also respectfully request your Lordships that the sentence inflicted upon White should commence from the time of arrest."

As the abolition of grand juries has been made the subject of an enquiry by the Dominion Government, the views which the people themselves take of such a radical, constitutional or political change must always be of interest and importance; and it is evident from the above presentment that the appointment of an official to take the place of the grand jury would not be popular with the Grand Jurors assembled at New Westminster.

J. A. FORIN.

NEW WESTMINSTER, B.C.

EDITORIAL REVIEW.

Priority of Chattel Mortgages: A Paradox.

A curious result appears to flow from the decision of the Court of Appeal in *Hodgins* v. *Johnston*, 5 App. 449. In that case a man made a chattel mortgage on 1st August, 1878, and registered it on the following day. In March, 1879, the plaintiff bought the chattels from the mortgagor. The mortgage was improperly renewed, and, for the purpose of the decision, expired at the end of the year. Some months after the expiry, the defendant, the chattel mortgagee, seized the chattels in the plaintiff's possession, and the action was brought for trespass to the goods. The plaintiff contended that the chattel mortgage, by reason of its not having been properly renewed, "ceased to be valid as against the creditors of [the mortgagor] and against subsequent purchasers and mortgagees in good faith for valuable consideration," and that he was a subsequent purchaser in good faith for valuable consideration. The Court held otherwise.

Moss, C.J.O., said, "The only question requiring consideration upon this appeal is whether the holder of a perfectly valid chattel mortgage is obliged to file a copy before the expiration of a year in order to keep alive his rights against a person who purchased from the mortgagor during the year." And he proceeds, "what was the object of requiring the refiling with an appropriate statement sanctioned by an oath? Clearly to prevent mortgages which had been wholly or partially satisfied, from remaining as apparent charges to their original extent. There was no intention of protecting persons who purchased or took mortgages, while the mortgage appeared to be in full vitality. Then what is the language used to effect this object? That unless refiled, the mortgage shall cease to be valid as against creditors and subsequent purchasers and mortgagees for valuable consideration. Until the end of the year it is to remain in force; then unless refiled it is to

cease to be valid. There the statute opens the door to creditors, whenever their claims arose, and to persons who subsequently become purchasers or mortgagees."

And Burton, J.A., said, "So far as persons in the position of the plaintiff are concerned, they suffer no detriment from this omission to renew. He had full notice of the defendant's mortgage, and that it was validly registered, and that the person in possession therefore, from whom he purchased, was not the owner. I think it would be a strained and forced construction, opposed to what I conceive to be the policy of these statutes, to hold the word 'subsequent' to apply to any but purchasers becoming such after the time when the mortgage should, in order to preserve its validity, be renewed."

The result of this is that a purchaser or mortgagee is not during the year a subsequent purchaser or mortgagee within the meaning of this section, and the first mortgage remains valid as to him without renewal; but a purchaser or a mortgagee after the expiration of the year is within the section, and the first mortgage, not being renewed, ceases to be valid as to him.

Suppose, now, that a mortgage is made to A., and is properly registered. During the year a mortgage of the same chattels is made to B. and registered. The mortgage to A. is not renewed. After its expiry, but during the current year of B.'s mortgage, a third mortgage is made to C. During the currency of C.'s mortgage, but after the expiry of B.'s, A. seizes and sells the chattels for more than the amount of his mortgage, but not enough to cover two mortgages. C. claims payment of his mortgage first, because A.'s mortgage expired before his was made, and he is, therefore, prior to A. B. says he is prior to C., because C.'s mortgage was made during the currency of his, and C. is not a mortgagee subsequent to B. and he must stand prior to C. wherever C. may rank. A. says that if B. is prior to C. then A. is prior to B.

This is A.'s case:—A. is prior to B. because B. is not, with regard to him, a subsequent mortgagee, and A.'s mortgage has not ceased to be valid against him.

B. is prior to C. because C. took his mortgage while B.'s was in existence, and therefore B.'s did not cease to be valid as against C.'s.

Therefore A. is first mortgagee and entitled to be paid first.

This is B.'s case:—C.'s mortgage, having been taken after the expiry of A.'s, is prior to A.'s. But B.'s mortgage is prior to C.'s because it did not case to be valid as against C.'s, for the same reason that A.'s did not cease to be valid as against B.'s. C., therefore, being prior to A., and B. being prior to C., B. must be first mortgagee.

This is C.'s case:—A. is prior to B., because his mortgage did not cease to be valid as against B. But C. is prior to A. because he took his mortgage after the expiry of A.'s. Therefore C. is first mortgagee.

The only remaining question is, what is to be done with the surplus?

Fusion of the Courts.

A cry goes up from the Law Society and the County Law Associations for the complete fusion of the Courts. We have devoted rather a large amount of space to the reports of the Law Society Committee and the Law Associations on this subject, not so much on account of its interest (for the most vital question becomes somewhat stale by repetition) but on account of the importance of the matter. The almost unanimous voice of the profession, unanimous at any rate, as far as expression of opinion can be given by the associations, is in favour of the carrying into effect of the Judicature Act. There is no doubt a waste of judicial strength at Toronto, and a consequent waste of time. It is abundantly clear that the work at trials is not being performed as it arises. Every assize closes with a large amount of arrears. The present jury list is not more than half finished, and if it had not been for the timely assistance of the Chancery Division Judges two non-jury lists would have remained untouched. The suggestions made and long desired by the Bar should be carried out, as far as Toronto is concerned, without further delay. If it is not speedily

done, the administration of justice in the county of York will become a public scandal. It is impossible to explain to suitors why their cases remain on the list for trial from one sittings to another without so much as an approach to trial. And it has had the effect of inducing solicitors to give jury notices in manifestly improper cases in order to have their cases entered on the jury lists and so enhance their chances of a trial. It would be well if in fixing the spring sittings for this year no distinction were made between the Chancery Division and the other Divisions.

There is also no obstacle except tradition in the way of holding the weekly Courts and Chambers for all cases indiscriminately; nor is there anything in the way of holding Divisional Court sittings in the same way, except the same tradition.

The suggestion by the Law Society Committee as to postponing the fusion of the circuits till after the next session of Parliament, in the hope of the judicial salaries being increased is not a prudent one. It was thought at the time of the consolidation of the Rules that the fusion would tend to reduce the total amount payable for circuit allowances. The amount by actual calculation was very small; but since that time two more assize towns have been added and there would be no reduction now. But apart from that, it gives the appearance of the amounts now payable being sufficient, and if matters can stand till the salaries are re-adjusted, the answer may come that the public need is not so great if we can wait for an increase in salaries. Again, the salaries might be increased only to an amount sufficient to equalize them under the new system with those under the present.

The matter is not, however, one of convenience only. It has become one of public necessity, and as such it ought to be treated. The increase of judicial salaries seems to be as far off as ever. But the efforts of the profession will not cease to obtain the increase.

FUSION OF THE COURTS.

The following is the report made by the committee appointed by the Benchers to consider this subject:—

To the treasurer and members of Convocation:—Your committee, appointed by resolution of 12th December, instant, begs leave to present an interim report. Your committee is very strongly of the opinion, that the fusion and amalgamation of the three divisions of the High Court of Justice is an urgent necessity, and should be completed without delay. Your committee is of the opinion that it is in the interest of the administration of justice that the double circuits should be abolished, and that common sittings should be held for trial of actions in the three divisions throughout the different cities and county towns of the province, that thereby much labour and expense would be saved, a greater uniformity maintained, and the interests of the public and of suitors much better served. Such sittings should be held at certain fixed periods for each city and county town, and should be more frequent than the present sittings of assize and nisi prius.

Your committee is also strongly of opinion that the separate sittings of the Divisional Courts should be abolished, and that there should be only one Divisional Court for the disposition of cases in all the divisions of the said Court, and that such Divisional Court should be composed of not less than three Judges, none of whom should be the trial Judge, and that there should be sittings of the said Court at least monthly, and more frequently when required.

Your committee recognizes the present difficulties in effecting the abolition of the double circuits, amongst others the pecuniary results to the judiciary, and that, in view of their present manifestly inadequate remuneration,

the change should not, except with the consent of the judiciary, be pressed at the present time; and, in anticipation of legislation by the Dominion Government at its next session, whereby provision may be made for increasing the remuneration of the judiciary, your committee is of opinion with regard to the abolition of double circuits and of separate sittings of the Divisional Courts that, beyond the presentation of a petition for such increase of salary to the Judges, and the presentation of copies of this report to the Minister of Justice and to the Attorney-General of Ontario, further action should be deferred until after the next session of the Dominion Parliament.

Your committee, however, is of the opinion, that provision might and should be made forthwith for the abolition of a double sittings for the trial of actions in the City of Toronto, and that there should be one sitting only in the City of Toronto for the trial of cases in all the divisions, and that Judges in rotation should be assigned to take such sittings of the Court for a period of at least two months each, and that there should be a sittings fortnightly of the said Court for the trial of non-jury cases; such sittings to commence on the first and third Thursdays in each and every month throughout the year, with discretion and power to the said trial Judge in his discretion upon application of either party to an action, to order and summon a special jury for the trial of such cases as may be deemed proper therefor, and that in addition to the provision above-mentioned, there should be a quarterly sittings of the said Court for the trial of jury and criminal cases as the practice now exists. And further, that upon a special application to the Chancellor or to the Chief Justice of the Queen's Bench and Common Pleas Divisions, a special sittings of the Court for the trial of non-jury cases or of cases requiring a special jury in any other city or county town may be at any time directed and held. And further that the separate weekly sittings of the Chancery Division and of the Queen's Bench and Common Pleas Divisions in single Court at Toronto should be immediately abolished, and also the separate sittings of a Judge in

Chambers, and that hereafter there should be only one sitting of a Judge daily for the purpose of hearing all motions in single Court for all the divisions, and one daily sitting of a Judge in Chambers for the hearing of all appeals or motions in all the Divisions.

And your committee is respectfully of opinion, that the changes as above mentioned with regard to the sittings of the Court for trial of actions in Toronto, and the outer special sittings of the Court for the trial of actions, and sittings of a Judge in single Court and in Chambers, are not only urgently necessary, but are quite practicable, and that common and public interests require that the same should be put into immediate force and effect. And it is recommended that a copy of this report should be transmitted to the Attorney-General of this province and to the President of the High Court of Justice, and the Chief Justices and Judges of the several divisions of the said Courts.

Your committee is of opinion that the tariff relating to the allowance for printing appeal books for the Court of Appeal should be revised, and that hereafter a less rate per page of six folios should be taxed or allowed in the action for the printing of such appeal books.

Your committee is desirous that the directions and power given to them by the resolutions of convocation should be continued for further action and report, and that such further direction and power should be given as to convocation may seem proper.

This report will be considered by convocation on Tuesday, February 2nd.

YORK LAW ASSOCIATION.

ANNUAL REPORT, 1891.

The Trustees in presenting their Sixth Annual Report congratulate the members upon the continued prosperity of the association. There are now 363 members of the association. Ten new members subscribed for stock during the year. The fees of 12 members are in arrear.

Two hundred and thirty-one volumes have been added to the library during the year; of this number 125 volumes have been presented. There are now 2,070 volumes in the library. The librarian reports that the attendance in the reading room is steadily increasing and most of the books are in constant use.

The county authorities have generously provided increased accommodation for the library, and have repainted and papered the library rooms and have completed and furnished the new room which was formerly used by the County Judges.

A portrait of Mr. Christopher Robinson, Q.C., third president of the association, has been presented by Dr. Hoskin, Q.C.; and a portrait of Dr. Hoskin, Q.C., fourth president of the association has been presented by Mr. Charles Moss, Q.C., the retiring president.

The librarian has completed a most useful catalogue which forms an index to the subjects dealt with in the books contained in the library, and to the articles published in the various legal periodicals.

In accordance with the wish of the association representations were made to the government urging the appointment of a second Junior Judge. A statute embodying these representations became law during the last session of the Legislature. The necessity for such an appointment having been represented by the trustees to the Dominion Government, the appointment of Mr. F. M. Morson, a member of the association, to the newly created office immediately followed.

The appointment has given the greatest satisfaction and has entirely relieved the pressure of work in the

Division Court, which, prior to the appointment, had caused much inconvenience to litigants and had endangered the health of His Honour Judge Morgan.

The trustees have done what they could during the year in urging on the movement having in view the fusion of the Courts as was provided for in the Judicature Act, but it seems to be difficult to bring about this end so desirable in the interests of litigants and practitioners.

There are still separate sittings of the Chancery Division for the trial of actions, and the weekly Divisional Court sittings are still held as if the Judicature Act had never been passed. There are still separate offices for the different divisions of the High Court, each requiring a separate staff of officials, and differences in practice exist in the different Divisions for which there is no warrant in the Judicature Act, and which ought not to be permitted to exist.

At the regular December meeting of the Board the following resolution was passed: "It was resolved that in the opinion of the Board of Trustees of the County of York Law Association, immediate steps should be taken to re-arrange the sittings of the High Court for trials in the County of York, to abolish special sittings of the Chancery Division for trials, to have one circuit list for the High Court, to re-arrange the weekly and Divisional Court sittings of the High Court so that all cases in the High Court may be heard at any sittings of the Court, and in other ways to bring about that complete fusion of the Courts which was contemplated by the Judicature Act."

This resolution was sent to the other Law Associations, and the following is a copy or statement of the resolutions received from some of the associations:—

The Hamilton Law Association express themselves as heartily in accord with the York Law Association in this matter. They consider that the fusion of the Courts heretofore has been far too incomplete, and are strongly of the opinion that definite action should now be taken to carry out the unanimous wish of the profession as expressed when the consolidation of the rules and orders took place. They are of the opinion that it would be necessary to obtain legislation on this subject, and are desirous of seeing

all the questions which are now under consideration by the profession, determined. In their opinion it is of the most vital importance that the special Chancery sittings should be abolished; that there should be but one Court, the Judges of which would take circuits at fixed dates and dispose of all business which could properly be brought to trial at an Assize or Chancery sittings, the circuit sittings to be held as frequently in the larger cities as business required, and that the Divisional Court should sit weekly in Toronto, and that there should be a daily sittings for the purpose of hearing appeals in Chambers, etc.; that the question of jury notices and the right of trial Judges to strike out juries should be definitely determined, and action taken for the purpose of considering the unnecessary expense in printing appeal books on appeals to the Court of Appeal, and to have the Devolution of Estates Act amended so as to put real estate on the same footing as that on which personal estate now stands and generally improve the Act.

It was resolved by the Leeds and Grenville Law Association, that in their opinion it is desirable a more complete fusion of the Courts should be obtained, and with that end in view, steps should be taken to re-arrange the sittings of the several Courts so that all cases in the High Court of Justice may be heard at any sittings of the Court, but this Association is of the opinion that no fewer sittings for the trial of actions should be held in the several circuits than are now held.

It was resolved by the Frontenac Law Association, that the Bar of Kingston desire to express their concurrence in the suggestions made by the York Law Association as to the abolition of special circuit sittings for the Chancery Division, and the re-arrangement of the sittings of the weekly courts in Toronto. Experience has shown that the special sittings referred to involve a great waste of the Judge's time. It might be possible if these sittings were abolished to give the opportunity of hearing cases in the country three times a year instead of twice, one of the Courts to be for the trial of cases without a jury. In Toronto the holding of separate Courts for the Common

Law and Chancery Divisions is a violation of the spirit of the Judicature Act and causes much real inconvenience to the profession outside of Toronto.

The Bar of the County of Kent, where no Law Association has been formed, are of the opinion that it should be definitely and finally decided before the sittings for trial whether an action should be tried with or without a jury; (2) that there should be two circuits, one for the trial of criminal cases and jury cases, and the other for the trial of non-jury cases; (3) that the dates of these sittings should be definitely fixed at proper periods for each year and should not be close together; (4) that there should be a complete fusion of the different divisions of the Court; (5) that a Judge in Court at Osgoode Hall should hear a motion in any Division; (6) that a Judge in Chambers should do the same; (7) that a Judge should sit so that such motions could be heard on any day in the week; (8) that the different Divisional Courts should be practically abolished, and that one Divisional Court composed of not less than three Judges should sit almost perpetually, or as many days in each week as would be necessary to hear the cases; (9) that the three Judges in the Divisional Court should not include the Judge who tried the case.

They also consider that a Judge should sit in certain central places outside of Toronto at least once a month to hear such motions against by-laws, awards, reports, pleadings, etc., as could be heard by a Judge in Court at Osgoode Hall where the parties consent thereto, and suggested London and Kingston as proper places to hold such Courts.

The Middlesex Law Association entirely approve of the resolutions of the York Law Association.

The Benchers of the Law Society have also taken up the question of these changes, and it is to be hoped that before the next annual meeting the Judges will comply with the request of the profession, which has been continually urged by this Association during the last five years.

The trustees suggest that a copy of this report be forwarded to the Judges in order that it may be made plain to them how earnest is the desire of the profession for changes having in view a true fusion of the Courts.

At the last session of the Legislature a bill was introduced providing that appeal books should not be printed. The trustees took care that proper representations were made with regard to this bill, which was prompted in the first instance without the requisite knowledge. The bill was finally passed providing that in County Court cases appeal books may be made by type-writing, four copies to be furnished, the appellant if awarded his costs to be entitled to $1 for every eight folios of one appeal book. The result of this statute is not an advantage. Copies of evidence are furnished which in many cases are absolutely illegible and the Judges cannot give such evidence due consideration. The convenience of the Judges would have been consulted and the same end gained if the bill had provided that in appeal cases the appellant, if awarded his costs, should be entitled only to $1 for every eight folios of the appeal cases. There is no doubt that the cost of printing County Court appeal cases required regulating, and such an enactment as that last referred to would have provided fairly for the cost. This suggestion was urged upon the Legislature, but was not concurred in for reasons which were not announced in any way and which are unknown to the trustees.

It is not possible for the trustees to make their report without recording their high appreciation of the services of the librarian, Miss Read. The library is now in the most efficient working condition. The reports and statutes are noted to date, the indexing affords the greatest assistance to practitioners; the books are kept in a good state of preservation, and owing to her great care, none have ever been lost. It is to be regretted that the limited income of the Association does not permit the trustees to increase the librarian's salary to a sum which would be a proper remuneration for the services she performs.

The trustees record the deaths during the year of the following members: The Rt. Hon. Sir John A. Macdonald, R. P. Echlin, D. J. MacMurchy.

WALTER BARWICK, *Treasurer.* CHAS. MOSS, *President.*

HAMILTON LAW ASSOCIATION.

ANNUAL REPORT, 1891.

The number of members at the date of the last report was 71; three new members have been added, some members have removed, and the present membership remains 71.

The annual fees to the amount of $322.50 have been paid.

The number of volumes in the library is 2,346, exclusive of sessional papers, gazettes, etc. There are still some reports which the trustees would like to see purchased when the funds of the association will permit.

The following periodicals are received, viz.: *The Law Times* (English), *The Times Law Reports*, *The Solicitors' Journal*, *The Albany Law Journal*, *The Canada Law Journal*, *The Canadian Law Reports*, *The Western Law Times*, "*Green Bag*," *Law Quarterly Review*.

The treasurer's report is submitted herewith, giving a detailed statement of receipts and expenditure, and of the assets and liabilities of the association and the same is in the form required by the Law Society. All the liabilities of the association have been paid except the balance of the advance due to the Law Society.

The trustees are glad to note the action which is being taken both by the Law Society and the York Law Association towards the more complete fusion of the Courts. This association is entirely in accord with such a movement which it has steadily advocated for many years, and the members feel strongly that legislation in that direction should be secured.

Attention is again drawn to the Devolution of Estates Act. The far-reaching operation of this Act is now being

understood and the amendments made at the last session are most unsatisfactory—apparently being aimed at special cases.

The expense attending the winding up of small estates under the supervision of the official guardian is very great, and power should be given to Local Judges and Masters whereby the expense could be materially reduced.

The Trustees would suggest the appointment of a Committee on Legislation to take these questions into their consideration, and act in concert with other associations in obtaining the reforms required.

The abolition of the grand jury system was considered at the last session of the Dominion Parliament and it is understood that the question will be more definitely considered this year, the trustees are very strongly of opinion that for the reasons set out in the minutes of this association, dated 25th April, 1891, and sent to the Honourable the Minister of Justice, no action whatever should be taken to in any way curtail the functions and privileges of the Grand Inquest.

EDWARD MARTIN,
President.

HAMILTON, January 5th, 1892.

Charles Farley Harris,
Library No.

THE CANADIAN LAW TIMES.

MARCH, 1892.

COSTS OUT OF THE ESTATE: EXCEPTIONS.

THE phrase, "costs out of the estate," has a familiar ring about it; and it is seldom heard without bringing a smile to the faces of the interested listeners. Perhaps no doctrine has tended so much to encourage litigation as that which lies at the foundation of this rule, and yet it is a necessary one. There are some useful checks interposed by the Courts in the way of exceptions, and we propose to give a few illustrations; but as they depend largely upon the peculiar circumstances of each case, we cannot hope to reduce them to complete system or order.

The general rule is well understood and undoubted. Where it is necessary to administer a fund, the cost of its administration, including all questions in dispute, should be borne by the fund. So it is, whether the administration is of the estate of a deceased person, or a partnership estate. The rule is the same in each. Again, where a testator or settlor by the will or settlement raises doubtful questions, they must be laid at rest at the cost of the fund bequeathed or settled. This is not a distinct rule from the first, but is one phase of it merely; because if questions are raised as to construction, administration cannot properly take place until they are solved, and their solution naturally takes place in the course of the administration.

The general limitation to the rule is well expressed in *Bartlett* v. *Wood* (*a*) where it is said:—"There can be no doubt that as a general rule in cases of administration it is above all things the bounden duty of the Court to attend to the subject of the payment of costs, and that the costs ought not to be given out of an estate, except for those proceedings only that are in origin directed, with some show of reason and a proper foundation, for the benefit of the estate, or which have in their result conduced to that benefit."

A very extraordinary instance of the allowance of costs out of a fund, where the plaintiff absolutely failed, is to be found in *Taylor* v. *Haygarth* (*b*). In that case a testatrix devised lands to trustees in trust for sale and to hold the proceeds in trust for such persons as she should by any codicil to her will appoint. She made no codicil. She was illegitimate and unmarried. A bill was filed by a person claming to be of kin to the testatrix but failed to establish any relationship. A supplemental bill was then filed by a legatee asking for administration; and the question argued was whether the Crown had any equity to compel conversion by the trustees so as to claim the personalty so realized as *bona vacantia*. It was held that the Crown had no such claim. The question of costs was disposed of by paying those of all parties out of the fund; the reason given being that the bill by an alleged next of kin had a better effect in instituting an enquiry for next of kin than a mere advertisement would have had, and so the estate was benefitted to that extent. Consequently the plaintiff (who had absolutely no claim) was held entitled with the others to costs out of the fund. To such a distance will the rule reach that the proceeding, if of benefit to the estate, must be paid for by the estate (*c*). It looks at first sight impossible to get out of reach of the rule. But we find exceptions.

(*a*) 9 W. R. 817. (*b*) 8 Jur. 135.

(*c*) See also *Thompson* v. *Sheppard*, 2 Cox. 161, where a bill was filed to set aside a will, and have the accounts taken as of an intestacy. The plaintiffs failed altogether; but as it was necessary in any case to take the accounts the plaintiffs had their costs out of the fund.

The first in natural order is an instance of costs of proceedings which are unnecessary or improper. Of such a class *Bartlett* v. *Wood*, already cited, is a good instance. In that case an infant, by his father as next friend, filed a bill alleging fraudulent conduct in the sale of an estate. A decree was made for an account and an enquiry as to the charges of misconduct. On an enquiry being had, the charges of fraudulent conduct failed, and on further directions the question of the costs of the enquiry arose. Stuart, V.C., thought it proper that the costs between solicitor and client should come out of the estate as they were incurred in the preservation of the infant's estate. But on appeal the Lord Chancellor, after expressing himself as quoted above, proceeded to apply the principle of limitation there set out, and said, "Then these proceedings which have given rise to nine-tenths of the costs in this case, are brought before the Judge in Court for his determination, and that which has become much more important than the original subject of complaint—I mean the whole of the costs of the suit of these unfounded and disproved allegations—are, in a manner which it is utterly impossible to justify, given by the Court out of the estate, and the extravagance of the order does not stop there, for the costs are even given as between solicitor and client. . . . I have not the slightest hesitation in making this direction" —and his Lordship declared that so much of the plaintiff's costs as were occasioned by the unfounded charges should be refused the plaintiff; but the costs of administration were paid out of the estate. If there had not been an expression of satisfaction by the defendants with this disposition of the costs, the next friend would have been ordered to pay the costs of the useless proceedings.

A like case was *Clayton* v. *Clarke* (*d*). In that case there was a decree for an account, and an enquiry whether the suit was for the benefit of the plaintiff, who was an infant. On appeal to the Lords Justices, the costs up to decree were awarded to the next friend of the plaintiff.

(*d*) 9 W. R. 718.

No costs of the enquiry were given, as it was said that it ought not to have been directed, and it was the conduct of the next friend which induced it, the application therefor having been made by the defendants. The grounds upon which the costs of the enquiry were refused, were that it was unnecessary, for *prima facie* it is an advantage to an infant to have the accounts taken and his property secured in Court, and therefore the decree for an account must have been right. The Lords Justices did not think that the infant should enjoy these benefits at the expense of the next friend.

Again, the principle of apportioning costs is sometimes resorted to for the purpose of relieving the estate. Instances of this are, where different questions arose concerning the realty and personalty, and each bore its own share, so that the personalty might not be unjustly burdened with unnecessary costs incurred by the heir as to the realty (*e*); and where long enquiries were necessary as to one share with which other parties had no concern (*f*).

It is also a rule that where extra or unnecessary costs are occasioned by one who is entitled to a share, that share and not the estate generally, must bear the costs. So in *Brace* v. *Ormond* (*g*), where a residuary legatee brought a bill for an account, and the plaintiff pending the suit assigned for the benefit of his creditors, and afterwards took the benefit of the Insolvent Debtors' Act, which necessitated two supplemental bills, it was held that the expense occasioned by the acts of the plaintiff in assigning and taking the benefit of the Insolvent Debtors' Act, ought to be borne by his share of the residue.

So, also, in *Mackenzie* v. *Taylor* (*h*). In that case a residuary estate being divisible amongst several, an account was made up, and the adults received their shares. The infants filed a bill for an account against the executors and the other

(*e*) *Leacroft* v. *Maynard*, 1 Ves. Jr. 280.
(*f*) *Mocatta* v. *Lousada*, 12 Ves. 128; *Basevi* v. *Serra*, 14 Ves. 313.
(*g*) 2 J. & W. 435.
(*h*) 7 Beav. 467.

residuary legatees, and the latter being satisfied objected by their answer to the proceedings. The Master of the Rolls said: "Taking the whole transaction, is it not clear that the bill was filed for the benefit of the infants alone? I do not see any reason for charging one who does not require the accounts to be taken, with the costs of a proceeding which he resists." Costs were accordingly ordered to be paid out of the plaintiffs' share alone. To the same effect is *Barber* v. *Barber* (*i*), where a question arose respecting one share of a residue, and it had to bear the costs.

These cases are not, in reality, exceptions to the rule, for it is the fund in question which bears the expense. Where the whole estate is affected, it bears the costs; where a part only, that part bears the costs. In *Robson* v. *Jardine* (*j*), a legatee whose legacy was charged upon lands specifically devised, brought a suit against the devisee and tenant by the courtesy who resisted payment of the legacy. The plaintiff succeeded, and the defendants were ordered to pay the costs, as there were no other assets out of which they could be paid, and it was not a question of construction within the rule which allowed the estate to be burdened with the expense of the solution. Why the exception was made is not stated, but it was manifestly a case concerning the specific devisee and tenant by the courtesy only, and their fund should rightly bear the costs.

Another class of cases in which the estate is relieved altogether, is where the proceedings are instituted by a stranger or purchaser, or take the form of ejectment, in which the will or instrument to be construed comes incidentally into notice, though the main intention is to obtain a construction of it. For instance, in *Marshall* v. *Bremner* (*k*), there was a devise to a widow for life, remainder to the children of the testator, the object being that during the life of the widow she might have the means of bringing them up. One child became insolvent, and the assignee raised the question whether the widow should not

(*i*) 3 M. & Cr. 688. (*j*) 22 Gr. 420. (*k*) 2 W. R. 320.

have converted the estate and invested the proceeds in Court rather than enjoy the income *in specie*. This was denied. Stuart, V.C., said, "The claim had failed in the object for which it was instituted, a claim being a most inconvenient mode to be adopted by the assignees in such a case; and he should not give the plaintiff any costs, but he would allow the costs of the defendants out of the estate."

So where a devisee, not being a legatee, claimed to share in a residue in which legatees only were entitled to share, he was refused his costs (*l*).

In *Givins* v. *Darvill* (*m*) a case was submitted under the Vendor and Purchaser Act for the opinion of the Court as to whether the children of a testatrix joining with a trustee in whom the legal estate was vested, could make a good title to land agreed to be sold by them to the purchaser. The sole question arose on the construction of the will. The Court held that a good title could be made, but ordered the purchaser to pay the costs.

Stevenson v. *Stevenson* (*n*) was a bill filed to share in lands devised subject to incumbrances. The lands were to be sold if not redeemed. One of the sons of the testator redeemed them, and the amount paid equalled the value of the lands. The Court held that the son who had redeemed the land had acquired a good title and dismissed the bill ordering the plaintiffs personally to pay the costs. Proudfoot, V.C., said, "It is not properly a bill for the construction of the will, but it is an assertion of a title, depending indeed on the construction of the will."

No doubt many other cases of a like kind could be cited; but the foregoing afford illustrations of the exceptions to the general rule.

(*l*) *Edwards* v. *Smith*, 25 Gr. 160.
(*m*) 27 Gr. 502.
(*n*) 28 Gr. 232.

GENERAL TOPICS: LEGAL AND OTHERWISE.

Unborn Children.

Not long since in the Court of Queen's Bench, Dublin, Ireland, a very remarkable legal point was argued and decided. Though one would have imagined it was an entirely new point, a large number of authorities on both sides were quoted, and many interesting points consonant with the subject discussed. The Judges were unanimous in their decision and seem to have agreed on all the important points.

The legal status of an unborn child was the point defined by the Queen's Bench recently with severe strictness in one of the most remarkable cases which for a long time the Courts have been called upon to decide. Mrs. Walker was travelling in that ill-fated train which has given Armagh a bad pre-eminence in railway accidents, and being at the time *enceinte*, she subsequently gave birth to a deformed child. She then took an action in the name of the child, for damages against the railway company, and the company demurring to the claim, the question came before the Irish Queen's Bench consisting of the Chief Justice, Mr. Justice Harrison, Mr. Justice O'Brien and Mr. Justice Johnson, whether the child in the circumstances, or anyone on its behalf, could in point of law bring such an action. The Court unanimously decided against the child. Briefly set out, the grounds of the decision are: that the child did not exist at the time of the accident; that no contract was entered into by the company in respect of its carriage; that no ticket was taken for its

conveyance; and that there being no undertaking, express or implied in regard to it, there could be no responsibility fastened on the company. The case, as Mr. Justice O'Brien, in the course of a singularly powerful and persuasive judgment said, illustrates a kind of creative boldness in litigation. And yet the decision shows that there is a form of negligence in justice and cruelty of which the law will take no cognizance and for which it declines to provide a remedy. "The pity of it," said Mr. Justice O'Brien, "was as novel as the case that an innocent infant comes into the world with the cruel seal upon it of another's fault, and has to bear a burden of infirmity and ignominy throughout the whole passage of life." The case makes a strong appeal to the sympathies of our common humanity, and it will be a pity notwithstanding the weighty judgment, if some effort is not made to have the point finally determined. It is admittedly hard, very hard, on a railway company to hold them responsible for the injuries sustained in an accident by an unborn child; but is it not equally hard that a child is born into the world a cripple for life, owing to the negligence of the company's servants, and that no compensation is to be awarded to it? Thus laments the Irish press over the decision in the case. The criminal law throws its shield over the child *en ventre sa mere*, Injuries which result in the death of a child before or after birth amount in the one case to manslaughter, and in the other to murder. So, too, the law regulating the rights of property recognizes the legal status of an unborn child, for it can take a gift by will, it may be appointed executor, and amongst other things an action if we mistake not, may be taken in its name for trespass and to restrain waste. It is scarcely a subject upon which to involve the view of the irrelevant Sterne, but those who remember the veracious chronicles of Tristram Shandy will recall in this connection how the rights and possibilities of the homunculus were defined. As was there urged, in however low and ludicrous a light he might appear in that age of levity to the eye of folly or prejudice, to the eye of reason and scientific research the homunculus stood a being guarded

and circumscribed with rights . . . a being of large activity, and in all senses of the word, as much and as "truly our fellow creature as any Lord Chancellor of England." Shandy, however, has no place in the authorized reports, and one would not suggest that if he had been cited in the argument, he would have influenced the judgment of their lordships in the Queen's Bench. But this may be remarked, that as regards the point which was raised in Mrs. Walker's case there is so much to be said for and against, that it would be a pity to leave it where it now stands. It may be as was pointed out by one of the judges, that the claim involves the creation of a new right, and that its recognition is the province of legislation and not of judicial decision. But until the two tribunals before which the case might still be argued—the Court of Appeal in Ireland and the House of Lords—have been invited to express their concurrence with or dissent from the judgment, we should prefer not to trouble the wise men of the Legislature. These are the views of the Irish press.

The following authorities and cases quoted by counsel on either side will be of practical assistance. The counsel for the defendants, in support of the demurrer referred to:—Cruise's Digest, vol. 8, Title 29, Descent, chap. 8, s. 11. *Richards* v. *Richards*, Johns. 754; Russell on Crimes, p. 645. *The George and Richard*, L. R. 3 Ad. & Eccl. 466. Counsel for the plaintiffs quoted a large number of authorities, *e.g.*, Black. Com. vol. 1, p. 116; 3 Inst. p. 50; *Wallis* v. *Hodson*, 2 Atk. 116; *Burdet* v. *Hopegood*, 1 P. W. 486; *Blasson* v. *Blasson*, 2 De G. J. & S. 669; Luttrell's case, cited in *Hale* v. *Hale*, Finch's Prec. in Ch. 50; *Musgrave* v. *Parry*, 2 Vern. 710; *Rex* v. *Joseph Senior*, 1 Mood. C. C. 346; *Reg.* v. *West*, 2 Car. & Kir. 784. Russell on Crimes, vol. 1, p. 646; *Thelluson* v. *Woodford*, 4 Ves. 227; Daniel Ch. Pr. p. 105; *Dalyell* v. *Tyrer*, 28 L. J. Q. B. 52; *Marshall* v. *York, Newcastle and Berwick Railway Co.*, 11 C. B. 655; *Austin* v. *Great Western Railway Co.*, L. R. 2 Q. B. 442; *Stockdale* v. *Lancashire and Yorkshire Railway Co.*, 11 W. R. 650; *Martin* v. *Great Indian Peninsular Railway Co.*, L. R. 3 Ex. 9; *Foulkes* v. *Metro-*

politan District Railway Co., 4 C. P. Div. 267; 5 C. P. Div. 157; Bevan on Negligence, p. 641.

In Abbott on the law of Shipping, the standard work on the subject, it is stated that if a pregnant woman be delivered during the voyage, no freight is due for the infant and the authority cited is Roccus, not. 79, Molloy, book 2, p. 4, sect. 8.

The subject of unborn children and their rights is one of perhaps more medico-legal, than general legal interest. In the present high state of civilization it is probable, however, that many more remarkable cases with even still stranger incidents than the one now elucidated may arise. These may be safely left to future judges to decide, and doubtless they will find authorities of former times, to aid them in their decisions.

The Position of Royal Posthumous Children.

An attribute of a king is perpetuity. The law ascribes to him in his political capacity an absolute immortality. The king never dies. Henry, Edward, or George may die, but the king survives them all; for immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity by act of law, without any *interregnum* or interval, is vested at once in his heir, who is *eo instanti* king to all intents and purposes. Thus a coronation is not necessary to complete the title to the crown. But Sir M. Foster holds that coronation is not a mere royal ceremony, but a solemn engagement between the king and the people. Of this *perpetuity* of the regal office, without suspension or abeyance even for a moment, a curious illustration and application was given in the House of Lords in the proceedings of the Regency Acts, 1 Wm. IV. c. ii. It was held by Lord Chancellor Lyndhurst, with the assent of the late Earl of Eldon, that in the event of the king's death leaving his widow with child, the crown would nevertheless descend upon the heiress presumptive, but subject to be divested by the birth of a child of the

deceased king, who would immediately become king or queen. It follows that by the decease of King William, and the birth and subsequent death of a posthumous child of that king, her majesty would have become queen, then descended to the station of a subject, and then become queen again. It does not, however, appear clear on principles of reason or policy, why the doctrine of the civil law, which gives the same rights to children in the womb as to children actually born, should not be applicable to such a case. *Qui in utero est, perinde ac si in rebus humanis esset custoditur quotiens de commodis ipsius partus quæritur:* L. 7 ff. de Stat. Hom.; and see L. 2, ff. de Excusat. L. 9 sec. 1 ff. ad Leg. Fa. A child unborn is not more incapable of exercising the regal or any other functions than an infant just born, or of very tender age, or a person insane. In all such cases the regal office must equally be administered by some other person. But cases may easily occur where the rights of the posthumous child could not be maintained against an heir presumptive in actual possession of the crown without a civil war: whereas those rights would be presumed and the danger of a disputed succession prevented, by the creation of a regency on the king's widow declaring herself with child, which could not continue above the usual period of gestation.

The law of England, however, is in this particular grounded on the feudal law, which requires that there should be a tenant to the land, not only *in rerum natura* but actually born, and therefore prefers the heir presumptive to the unborn heir-apparent. It has been settled by our courts of justice, that the child before its birth cannot be seised of real property. It vests in the presumptive heir; he possesses the property and enjoys it, without keeping an account, as entirely as the heir apparent would, if he were born. Beside, it was argued by the Lord Chancellor Lyndhurst, that in the king's name justice is administered, and all acts of government are performed, and that therefore it was not possible to suspend the descent of the crown on the heiress presumptive, even during the ordinary period of gestation. His lordship

further urged, that the crown is entitled to real property, and that such real property must, on the decease of the king, vest in her royal highness the princess Victoria, and not in the supposed infant *en ventre sa mère*. He said that it was extraordinary that our history afforded no precedent to be followed; but mentioned two cases of this nature which had occurred in the history of France. On the death of Louis X., the presumptive heir to the throne was appointed regent, and continued so until the birth of the posthumous child. The child was a male, and therefore, entitled to succeed to the throne; but it lived only eight days. At the death of Charles the Fair, his widow was seven months gone with child. The presumptive heir to the throne was again made regent. The child proved to be a female, and consequently could not succeed to the throne by the law of France. The regent thereupon succeeded. It is, however, to be observed, that the authority of the civil law in France, even in the *payis coutumier* was very great; and this accounts for the course followed in these important instances. But as the Lord Chancellor informed the house, the descent of the crown is governed in England by the same rules which regulate the descent of real property, with two exceptions; the first of which is, that the half-blood is no bar to the succession; and the second is, that, in case of two or more daughters, the eldest succeeds alone. With respect to the half-blood the law of descent of real property is now altered by 3-4 Wm. IV. c. cvi.; and the half-blood succeed next to the whole blood. He admitted on the authority of Hargrave (Brief Deductions), that the law on this point was unsettled: but concluded that it ought to be decided by analogy to the law of descent of real property.

His lordship suggested that if a regency were to be created during the period of gestation, the regent should administer the government in the name of the presumptive heir, liable to have his authority divested on the birth of the posthumous heir apparent; because thus the principle, that the crown is never vacant, would not be violated, whereas a contrary method of appointment would be the

creation of a parliamentary sovereign, under the name and style of regent. But, on the other hand, there seems to be an incongruity in appointing a regent to act in the name of a sovereign who is fully capable of acting in person. Besides, there does not appear to be any solid reason why the regent should not administer the government on behalf of the unborn child. There would be no greater absurdity in this, than in a regent governing in the name and by the authority of an infant in arms, or of a person *non compos*. The law, in all these cases, is grounded on a fiction established for paramount reasons of public good; and that fiction is as applicable to the case of an unborn child, as to other cases of the absolute incapacity of the sovereign. If the right to the crown vests in the unborn child the regency should, upon principle be on its behalf; and if it does not so vest there is no occasion to appoint a regent during the interval, except for the purpose of preventing an usurpation on the part of the heir presumptive. But this last object might equally be attained by limiting the regal power of the heir presumptive during the period of gestation; and we may fairly question whether there would be anything at variance with monarchical principles in imposing extraordinary restraints on the royal prerogative, while it remains in the hands of a sovereign whose title is defeasible, or subject to be divested on the occurrence of a given event.

It is true, that if eventually no posthumous child were born, the heir presumptive would have been delayed in and deprived of his right to the throne, during the period of gestation. But it may be doubted whether any great weight is due to the possibility of such a delay of right during a fraction of a year.

The English constitutional law on this subject is, however, now fixed by the precedent of the statute, 1 Wm. IV. c. 11.

This subject as debated by Mr. George Bowyer in his work on the "English Constitution" published some fifty years ago, is, as will have been perceived, somewhat akin to the rights of an unborn child as detailed in our first note. It may be further noticed that with regard to the possibility of a king's death, his natural dissolution is

generally called his demise—*demissio regis vel coronæ*, an expression which signifies merely a transfer of property. For when one speaks of the demise of the crown, it is merely meant that the kingdom is transferred or demised to his successor and so the royal dignity remains perpetual.

An International Commercial Bureau.

An English parliamentary paper has been issued on the kindred topics of Customs Laws and Tariffs. It indicates that an International Bureau for the exchange of mercantile information, tariffs and other news congenial to merchants and shippers is to be established at Brussels. Very interesting negotiations have been carried on for some time past at that town between the representatives of different nations, including Great Britain and many of her colonies. These were brought to a close in July, of 1891, and are of great importance to traders and their legal advisers. It was very pertinently pointed out that export merchants experience great difficulty in ascertaining the tariffs in any particular country on their goods. Tariff changes are sometimes rapid and perplexing, especially when the financial proposals of a minister to a representative assembly are under discussion, and a merchant is not always able to follow even though accustomed to the peculiarities of the country. A special section of the Board of Trade official journal records some changes, but this is not always satisfactory, as the information cannot invariably be official, and therefore, not always up to the latest date. It was with the object of devising a method of making the tariff alterations in various countries known, as early and as widely as possible and in the most authoritative manner, that the representatives of about 40 countries and colonies met in congress at Brussels in May, June, and July, 1891, and arrived at conclusions, which, the arrangements having been ratified by the governments concerned, have now been officially made known. It appears that an association known as the Union Internationale pour la Publication des Tariffs Douniers is to be formed "to publish, at joint

expense, and to make known as promptly and as exactly as possible, the Customs tariffs of the various states of the globe, and the modifications to which these tariffs may from time to time be subjected." An international bureau will accordingly be formed at Brussels to translate and publish the tariffs, as well as such legislative or administrative measures as may modify them. These documents will be published in a bulletin in German, English, Spanish, French, and Italian, and all the contracting parties agree to send at once to the Bureau copies of their Customs laws and tariffs, carefully corrected up to date, of all future laws and regulations, of all circulars and instructions from governments to their customs authorities in regard to their application of goods, and of all commercial treaties, conventions and internal legislation relating to customs tariffs. All this information will be published by the Bureau and circulated amongst all the governments which are parties to the convention, each of which then takes its own measures for the publication of it to the mercantile bodies and the merchants concerned. The Bureau will be under the administrative control of the Belgian Foreign Minister, and provision is made for the distribution amongst the various powers of the total expense estimated at 125,000 francs. Great Britain and her Crown Colonies contribute a maximum of 6,833 francs and receive 456 copies of the bulletin, which is a number probably sufficient to supply all the leading commercial bodies, at the same time placing within the reach of every merchant the means of obtaining in the most authentic way, and at as early a period as possible, information which may be of vital importance to him. British India, Canada, New South Wales, Victoria, and the other self-governing colonies also contribute their shares according to fixed proportion, based on the respective volumes of their trade and of course receive an equivalent number of copies of the bulletin. The convention is to date from April 1st, 1891, and it remains in force for seven years, when, if it has not been "denounced," it will have effect for another term of seven years, and so on from one term to another. Powers and Colonies which were not represented in the

negotiations are at liberty to join afterwards. South Australia and Western Australia have not, however, joined the union. Commenting upon these arrangements the English press consider there has never been so striking a testimony to the universal appreciation of the value of the dissemination of commercial information as this convention. It is only in quite recent years that the governments of even the most commercial states have thought it necessary to obtain or publish such information, and now all the civilized nations of the world, and some whose degree of civilization may be matter of discussion, are found joining together to make known *urbi et orbi*, information of value to merchants only, but of immense practical value to them. The convention is a federation of the world for a particular purpose, viz: the circulation of one, and that the most important kind of commercial information.

These rules and regulations should go far to encourage international trade and promote that amity so essential to the well-being of nations.

Can a Judge Return to Practice?

Can a retired judge practice at the Bar? The point is an interesting one, and it might be raised at any time by the action of a judge, who, on his retirement might desire to resume his old rule of advocate. There is no precedent for an English judge appearing again at the Bar after retirement, but it is not an uncommon thing for an Indian or a colonial judge to resume practice when he has left the Bench. These officials, however, are in an entirely different position to their English brethren, and their example counts for very little. The absence of an English precedent is much more to the purpose, and it would probably be considered conclusive by the Bar Committee, if not by the judges before whom the question might be raised. Any way it would be decidedly unfair for a judge who had received a handsome pension to enter into competition with his struggling professional brethren who had yet a career to

make, to say nothing of the awkwardness of the situation which would be created.

A comparison of colonial practice with that prevalent in England would, doubtless, be very interesting to English practitioners. It is somewhat singular how little is known here of colonial practices and customs so far as regards the legal world; though persons who have been resident in the colonies, notably Canada, point out how many advantages English lawyers legally might derive from following the practices of their colonial brethren, if only some one would show them the way.

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EDITORIAL REVIEW.

Grand Juries.

We have noticed from the daily newspapers that a bill is to be brought into the Ontario Legislature at its present session to reduce the number of Grand Jurors to thirteen. An Act of the Legislature already exists, reducing the number of Grand Jurors to fifteen, but it awaits the proclamation of the Lieutenant-Governor to bring it into force on account of the doubt as to its validity. If the report is correct, nothing more will be done than to further reduce the number. The measure will in any case, we presume, be suspended in its operation until an authoritative and final decision can be procured as to its validity; otherwise it would be most dangerous to risk the disposition of the criminal business under it. Whether suspended or not its validity will no doubt be challenged.

The recent return, showing the opinions of the Judges and Attorney-General as to the expediency of altogether abolishing the Grand Jury, contains the circular letter addressed to the Judges and Attorneys-General by the Minister of Justice asking for their opinions. They were obtained, according to this letter, in anticipation of the bringing into Parliament of his proposed codification of the criminal law. And no doubt the Minister assumes the power of the Dominion Parliament to legislate regarding Grand Juries.

To this letter the Attorney-General of Ontario replied, "that the Grand Jury is a part of the constitution of the Court, and is not a matter of mere procedure." The expression "the Grand Jury . . is not a matter of mere procedure" is a very careless one, and does not adequately express the Attorney-General's view. Perhaps it is hypercritical to say that living men can never be "procedure" in any sense, and when the full expression,

"trial by jury is not mere procedure" is used, it does not on its face carry conviction. The petty jury in civil cases was evidently not deemed to be a part of the constitution of the Court by the draughtsman of the Judicature Act, nor by the revisors of 1887; for under "Constitution of Supreme Court" we find nothing about juries; but under "Trial and Procedure" we find directions as to what cases are and what are not to be tried by a jury, and all the other directions as to securing or dispensing with a jury. So in the old digests, where the several ancient modes of trial are set out, trial by jury is spoken of as one of the modes of trial. And at the present day it is common to speak of the "mode of trial," *i.e.*, whether by a Judge without a jury or by a Judge and jury. We also find a well defined distinction drawn in the old books between "the Court" and the jury, especially in those parts which relate to the punishment of the jury for contempt of the Court and other offences. A Grand Jury is not to be treated upon exactly the same lines however; but if the petty jury is not a part of the Court *a fortiori* a grand jury is not. A prisoner acquitted by a petty jury cannot be again tried; but if an indictment is thrown out by a Grand Jury another may be presented to another Grand Jury.

On the ground of uniformity, if on no other, the better policy would be to leave the Grand Jury to be dealt with by the Dominion Parliament. The Criminal Law and Procedure in criminal matters were assigned to that body for that purpose, and it would destroy the effectiveness of that measure to have a different mode of trial in each Province.

But abolition of the Grand Jury would mean a complete change of procedure at the trial. An indictment would no longer be sent in for enquiry. The accused would stand committed for trial by a magistrate or some like official, and it would be the purest formality to put a charge into writing, call it an indictment, and ask him to plead. Some provision would have to be made for a change in the procedure immediately preceding the actual trial, and if the Provinces can deal with Grand Juries by abolishing them, the Dominion Legislature most perforce follow their lead

and change their procedure so as to accommodate it to the new state of affairs. Thus, the independence of the Parliament would disappear, and it would be unable to secure that uniformity in criminal procedure which it was designed that it should have.

The discussion which is sure to arise will be most interesting. On the side of the Province a very cogent argument can be advanced to show that the constitution of the Court involves the power to dispense with a jury altogether; while the argument of convenience rests strongly with the Dominion.

Professional Etiquette.

The position which a barrister and solicitor occupies with regard to etiquette is sometimes forgotten in his anxiety to secure gold. And if sometimes forgotten or disregarded by members of the profession themselves, we are not surprised to find that laymen sometimes forget what is due to them. Not long since we had the rare privilege of reading an advertisement by a corporation calling for applications for the position of solicitor to the corporation at a fixed salary, the same being about one-fourth of what would ordinarily be earned. The applications were to be made by sealed letter, after the manner of tenders, endorsed "solicitors' applications," to be received up to a certain hour on a certain day, and to be accompanied by certificates of character and ability! There is a grim sort of humour in this, which is heightened by the fact that only two applications were received.

If another advertisement had met the eyes of the members of the corporation, they might have been able to come to terms with a gentleman who tells the public that consultation with him is free.

Mr. Dalton's Resignation.

We are informed that Mr. R. G. Dalton, Q.C., Master in Chambers, has sent in or is about to send in his resignation on account of failing health. The news of his retirement will be received by the profession in Ontario with the

deepest regret, not only on account of the painful circumstances which occasion it, but also on account of the great loss that both they and the public will sustain by reason of the loss of a learned, upright and genial official.

To his learning and judicial qualities were added an equable disposition, a gentle manner, and a disposition to oblige in every possible way. We believe that we can say that no one ever was repulsed who approached him, whether early or late, in or out of office hours, on official business. His decisions were most highly respected, though sometimes (but rarely) based rather upon what he considered just and righteous, than upon strict right.

The Economy of the Law Society.

Every body, public and quasi-public, accustomed to spend large sums of money, once in a while turns its attention to economy, and when it begins to economize generally finds that it does not understand the subject; and when it does not understand the subject it proposes to deal with, it generally does something ridiculous—or worse.

The Law Society receipts for the past year exceeded $80,000. Out of this it built a handsome Law School which cost over $30,000. This was a year in which, therefore, it was necessary to practise economy in other directions. And so we find that the faithful old man of all work about the Hall, who is paid $1 a day, upon which he keeps alive a family, was fined fifty cents for taking a half-holiday to visit the annual exhibition. This is ridiculous—and a little worse.

Then attention is turned to the Secretary. After more than twenty years' service, by as faithful an officer as the Society ever had or ever will have, they determined to appoint a successor; and proposed to relieve the present incumbent of his duties and his salary at the same time. Fortunately, a sufficient number were found whose feelings of common humanity revolted at the suggestion to turn an old man out on the world, whose twenty years of service with them had absolutely unfitted him to resume the

struggle for existence in active practice. But the utmost they could achieve was to secure his retention in his employment at a reduced salary. Hitherto he has had a salary of $2,000 per annum, with free rooms in the Hall, and light and fuel. Now he is reduced to $1,500 per annum without perquisites, which practically means a reduction of $1,000 per annum. Was ever such treatment dealt out for faithful performance of duty?

It is on record that one Bencher, some few years ago, retired from the Bench in order to be appointed to an office in the gift of the Society. A few years later another Bencher retired from the Bench to another office in the gift of the Society. Later still a third retired from the Bench and received a gratuity of $2,000. But a faithful officer, after twenty years' service, instead of retiring with a pension which he has well earned, is in imminent danger of being cast out on the world without means of employment, and without even a gratuity.

There is nothing ridiculous in this, but something infinitely worse.

Piracy.

The *American Law Review* is, as we might expect, generally fair and judicial in its remarks. But in the November-December number it declares that it has "pleasure in stating that the Boston Book Company, 15½ Beacon Street, Boston, are issuing in this country a volume called 'English Citations,' being an index of all English cases judicially noticed between the years 1865 and 1890. The work has been compiled by George John Talbot and Hugh Fort, and must prove of great value to the profession." It would have been doing but scant justice to the authors and publishers of this excellent compilation—and to the *American Law Review* itself, for that matter—to have mentioned that the work was compiled in England by two barristers, there published, and that the proper title is "Index of cases Judicially Noticed," which title the American publishers have changed to "English Citations," but which will not,

however, conceal the piracy. The best reward that an English book of general value receives in the United States, is to be reprinted at a cheaper rate and kept out of the market by the pirates.

While we are finding fault, we may just as well attend to home affairs too. From Montreal issues a new venture called the *Monthly Law Digest and Reporter*, which is designed to exhibit to the profession the decisions of interest from the Dominion of Canada, the United States, England, France, Ireland and Scotland. This is a large bill to fill. And as this journal has been in the habit of giving all the cases decided throughout the whole Dominion as soon as they can be procured, we naturally looked to see how the work of the new digest compared with our own little efforts. Barring a difference of arrangement the work is very good—excellent, we might say. A comparison of the Canadian cases in the new digest with the same in this journal shows that they have been copied word for word from our pages of Occasional Notes. Therefore we say they are excellent. We have had enough experience of law to know that it would be very foolish to ask for the intervention of the Courts to prevent infringement of our copyright. Leave law suits to laymen. And the only other way to stop it would be to stop publishing this journal. We can't do that. So we suppose we must let the Montreal publication proceed, and rest satisfied with the knowledge that it must always wait for our issue in order to get the Canadian cases, and while our subscribers are reading the cases Mr. Editor will be busy preparing the same for press.

The most refreshing part of the affair is that the second part which was kindly sent to the writer was accompanied by a sight draft for a year's subscription; as if we did not do enough for them by supplying cases for them to print.

The whole proceeding is decidedly cool. The Editor's name is Snow.

REVIEW OF EXCHANGES.

American Law Review.—September-October, 1891.

A Summary of Quasi-contracts, by JOHN H. WIGMORE. "A quasi-contract right, or right of restoration, is a right to obtain the restoration of a benefit, or the equivalent thereof, conferred by the claimant, but unjustly detained by the defendant." The subject under this definition is treated in propositions or rules and examples. English and American cases are cited.

The Decisions of the Comptrollers, by EDWARD IRELAND RENICK.

Is Unpaid Capital a Trust Fund in Any Sense? by R. C. MCMURTRIE. It is said that the phrase that the capital of a corporation constitutes a trust fund for the benefit of creditors was an invention of the Supreme Court of the United States. The learned writer criticises this view and expresses the true rule, thus:—"That a body of men who invite dealing with themselves on the basis of a fund that is alone to be liable for the debt, must show that they have not unfairly dealt among themselves in discharging the liability they assumed to contribute to the fund they put forward as a basis of credit."

Land Transfer and Registration of Title, by WM. D. TURNER.

Avoidable Causes of Delay and Uncertainty in our Courts, by ALFRED RUSSELL, LL.D.

Ibid.—November-December, 1891.

Liberty of Contract Under the Police Power, by FREDERICK N. JUDSON. A discussion as to the constitutional provisions against deprive ing a man of life, liberty or property without due process of law.

A Lawyer's Commentary upon the famous case of Shylock v. Antonio, by JAMES M. LOVE.

When Property is Damaged for Public Use, by FRANK HAGERMAN. Many English and American authorities are cited upon damaged property or property injuriously affected.

The Law of the United States Supreme Court as to Capital Stock not fully paid, by THOMAS THACHER. A criticism of the decision that the capital stock of a corporation is a trust fund for creditors.

History of the First Georgia Code, by RICHARD H. CLARK.

Criminal Law Magazine.—January, 1892.

Criminal aspects of the Praeternatural, by ARDEMUS STEWART The article deals with the responsibility of a person who persuades another who is subject to his influence to commit a crime; with the presence to the possession of præternatural powers which by statute is as false pretence; witchcraft; and the vagabond acts.

Notes on Criminal Practice, by E. CLINTON RHOADS. American cases are cited.

Charles Carey Harris,
Library No.

THE CANADIAN LAW TIMES.

APRIL, 1892.

DISCOVERY IN ONTARIO SINCE THE JUDICATURE ACT.

(*Concluded from February Number.*)

WE now continue the subject which was unfortunately interrupted.

Defendant's right to Discovery before delivery of statement of defence.—Under the Judicature Act it is necessary for a defendant to set up the facts constituting his defence, and where under the peculiar circumstances of the case he cannot be familiar with those facts, he is, under Rule 566, allowed to examine the plaintiff for discovery before delivery of his defence. Thus in an action upon a covenant in a lease for payment of rent, after statement of claim but before defence filed, the defendant wishing to set up a surrender, obtained, under Rule 285, now 566, upon the affidavit of the defendant's solicitor showing that without such discovery as he thereby hoped to obtain he couldn ot properly plead to the action, an order in Chambers directing the examination of the plaintiff, and three witnesses, persons interested in the estate, for discovery as to material facts necessary to be alleged in his defence. On appeal the order was affirmed, the learned Chancellor observing that he thought it was plain that such discovery could be obtained by the defendant after he had formally pleaded, in order to get such details as would enable him to amend and comply with the rules of Court as to particularity in pleading,

(citing Bramwell, L.J., in *Phillips* v. *Phillips*, 4 Q. B. D. 127, 131), it being in the discretion of the Court to grant or withhold such discovery; and that "no doubt this right of discovery must be jealously guarded lest it be abused, and that it should, under Rule 285 (now 566), be conceded only when it is clearly proved to be necessary to the furtherance of justice" (*a*).

And in an action against the publishers of a newspaper for libel, the defendants on motion under Rule 285 (now 566) showing *bona fides* in their affidavit, were allowed to examine, with certain restrictions, the plaintiff before defence filed (*b*).

Wallis v. *Newton* (*c*) was an action to enforce an agreement by which the plaintiff had agreed with one K. to do plumbing, etc., for six houses which K. was building, and to take in payment for the work the most easterly of the houses subject to a mortgage, which agreement was registered, and K., having subsequently conveyed the six houses to the defendant, and left the Province; and it was held, dismissing an appeal from an order of the learned Master in Chambers, that it was in the interests of justice, that the defendant should be allowed to examine the plaintiff for discovery before delivering his defence. It had been objected that the examination could be had in the ordinary course immediately after the delivery of the defence, as the defendant could set up that the plaintiff had not done the work on the houses properly, even if he was not familiar with all the facts; but the learned Chancellor, before whom the appeal was taken, observed that "the very fact that the discovery sought could be obtained by putting in a defence formally, and amending it afterwards, showed that it could not harm the plaintiff to have the examination now."

A defendant loses his right to examine the plaintiff for discovery by allowing interlocutory judgment to be signed

(*a*) *Boulton* v. *Blake*, 11 P. R. 196 (1885).
(*b*) *Tate* v. *The Globe P. Co.*, 11 P. R. 253 (1886).
(*c*) 7 C. L. T. Occ. N. 188 (1887).

against him; although the action is about to come on at the assizes for assessment of damages (*d*).

And where an order to examine a party before trial has been granted, such examination cannot be had after the trial has taken place; and it was so held where the verdict rendered was a nominal verdict only, subject to a reference to arbitration. Mr. Dalton, Master in Chambers, observed that the effect of the verdict upon the order to examine was to render it void, together with the appointment made in pursuance of it. The order to examine was granted for the purpose of assisting the plaintiff in proving his case at the trial, and when once the trial had taken place the order could no longer be acted on (*e*).

Particulars.—In this Province the practice of ordering particulars depends on the inherent jurisdiction of the Court to prevent injustice being done, the rules in force in England not having been adopted here (*f*).

Crabbe v. *Hickson* (*g*) is a typical case, like *Saunders* v. *Jones* (*h*), an action for damages for wrongful dismissal, and the defence put in being misconduct generally. In both actions it was held that the plaintiff was entitled to substantial particulars of the acts of misconduct upon which the defendant meant to rely. A concise illustration of the general principle upon which particulars are ordered is given by James, L.J., in *Benbow* v. *Low* (*i*), viz.: "If a man say, 'I am entitled to an estate because you have committed breaches of covenant,' the other party is entitled to ask, 'Tell me what breach of covenant I have committed?'" The practice of obtaining particulars upon interrogatories or examination for discovery in England is said to be "a practice coming to the Chancery Division from the old Court of Chancery, not as a rule to give better

(*d*) *Ashley* v. *Brenton*, 13 P. R. 98.

(*e*) *Shelly* v. *Hussey*, 8 P. R. 250 (1880).

(*f*) *Queen Victoria Niagara Falls Park Commissioners* v. *Howard, et al.*, 13 P. R. 14.

(*g*) 10 C. L. T. Occ. N. 344 (1890).

(*h*) 7 Ch. D. 449.

(*i*) 16 Ch. D. at p. 97.

particulars, although of course it could be done, but to allow the particulars to be obtained by interrogatories."

Particulars of the names of all the persons in whose presence slanderous words, which were the subject of the action, were spoken, were ordered to be given in the case of *McMillan* v. *Colwell* (*j*).

A party is not obliged to disclose upon what evidence he relies, or by what means he is going to prove his contention.

In an action of trespass to land the defendants pleaded a lease from the Dominion Government, and that the lands had been vested in the Government as Ordnance lands. This was pleaded in an unexceptionable manner, and no affidavit was filed by the plaintiffs to show that they were unable to reply without further disclosure; and it did not appear that the defendants had any special means of information as to the matter of title not open to the plaintiffs; and an order made by the Master in Chambers for particulars of the facts and means by which and the time at which the lands became Ordnance lands, was on appeal set aside (*k*).

And in some cases particulars will not be ordered until the party from whom they are sought has first had discovery.

In *Sims* v. *Slater* (*l*), the plaintiff stated that the defendants conspired to induce the Minister of Railways to take a contract out of the hands of the plaintiff to his prejudice and damage, and it was held that the plaintiff, in a case of the kind, should not be called upon for particulars until he had had an opportunity of examining the defendant for discovery.

Discovery from persons not parties to the action—Where allowed.—On a question of title where the defendant having by facts which had come to his knowledge been put upon enquiry as to whether a certain conveyance to his grantors had been obtained by fraud and undue influence,

(*j*) 7 C. L. T. Occ. N. 141.

(*k*) *Queen Victoria Niagara Falls Park Commissioners* v. *Howard, et al.*, 13 P. R. 14.

(*l*) 10 C. L. T. Occ. N. 227 (1890).

an order was made under Rule 285, now 566, for the examination for discovery of the grantors in that conveyance although not parties to the action (*m*).

In an action against the trustees of an Orange Lodge for the price of work and materials in building a hall, the chairman of the board of trustees was examined and could give no information as to the matters in dispute. His examination showed that the architect employed by the defendants was the person from whom alone the information could be had. The defendants had successfully resisted the production of the plans, as being in the custody of the architect, and belonging to him. An order for the examination of the architect, for discovery only, was affirmed (*n*).

In an action of ejectment where the plaintiff claimed title under a conveyance from the father of the defendant in 1885, and the defendant claimed by virtue of possession since 1874 under a verbal agreement to purchase made with his father, and the defendant said on his examination that he had paid his father money on account of the purchase, which he had entered on his father's books, an order was made for the examination of the father and production of his books for the purpose of discovery before trial. It was held, and affirmed on appeal, that the father might have been made a party under Rule 109 (now Rule 330) on the ground of his having been a party to the fraud in conveying the land to the plaintiffs after he had made an agreement with his son, and such being the case, there was no doubt of his liability to be examined under Rule 285, now 566 (*o*). It was material that the dealings should be thoroughly examined much more deliberately than could be done at the trial.

Where the action was for libel and slander, and the libellous or slanderous words were contained in letters written

(*m*) *Brown* v. *Pears*, 12 P. R. 396 (1888).
(*n*) *Smith* v. *Clarke*, 12 P. R. 217 (1887).
(*o*) *McMaster, et al.* v. *Mason*, 12 P. R. 278 (1887).

by the defendant to B. the plaintiff's former employer who was not a party to the action, the plaintiff was allowed to examine B. for the purpose of discovery (*p*).

Where the plaintiff who was the father of A. S. M. an insolvent trader, sued the person who was assignee in trust of A. S. M. claiming a declaration of right to rank on the estate for a large sum, the assignee was instructed by the creditors to resist the claim, and had himself no personal knowledge of it, and could find no entry of it in the books or papers of the insolvent. An order for the examination of the insolvent by the defendant for purposes of discovery before trial was affirmed on appeal (*q*).

In *Carnegie* v. *Cox & Worts* (*r*) the defendants asserted, as a counter-claim, a claim against the plaintiff, which they had bought from the assignee of F. & L., stock-brokers, who were not parties to the suit, which claim was for balance of account for carrying stock for plaintiff. The plaintiff swore that he believed F. & L. had dealt improperly with the stock that they were carrying for him, but that he had no means of discovering what they had done with it unless by examining them. Under these circumstances an order was made partly under R. 285 (now 566) for their examination for purposes of discovery only and that the plaintiff might be enabled to frame his defence to the counter-claim; the learned Master remarking further, that he did not order that the examination should be evidence for or against any one.

The plaintiff, a judgment creditor of the defendant, served upon the solicitor of the defendant a notice of motion for an injunction restraining the defendant from receiving any of the moneys due to him from the government of Canada in respect of his interest in the contract of A. F. M. & Co., for the construction of the Tay canal, (in which contract the defendant had a one-fourth interest), and for an order appointing the plaintiff W. A. R. receiver, without emolument, of so much of the moneys coming to the defendant as would satisfy the plaintiff's judgment.

(*p*) *Gordon* v. *Phillips*, 11 P. R. 540.
(*q*) *Murray* v. *Warner*, 11 P. R. 440 (1886). (*r*) 11 P. R. 311 (1886).

On return of the motion, and in opposition thereto, an affidavit was filed of A. F. M., the defendant's partner as to the position of the partnership affairs. He was cross-examined upon his affidavit before a special examiner, but was unable to answer a number of the questions because he had not the firm's books, which could alone explain the defendant's position in regard to the partnership assets and liabilities. M. refused to produce the books from which alone the facts could be ascertained, and by means of which any benefit could be derived from his cross-examination. The examiner ruled that the books referred to in M.'s examination should be produced; but he refused to produce them. Upon a motion for that purpose he was ordered (following *In re Emma Silver Mining Co.*, L. R. 10 Ch. 194) to attend for further examination, and to produce the books before the special examiner, at his own expense. The question of the receivership could be mentioned after the examination was concluded (*s*).

Although under Rules 488, 510, examination for discovery and production of documents may be had from a person for whose immediate benefit an action is prosecuted, the interest of such person must be clearly shown; and where the evidence on that point was unsatisfactory the Court varied the order of the learned Master by directing that he examination should not be read at the trial against the plaintiff, but should, as well as the affidavit on production, be used for the purposes of discovery only (*t*).

The same—Where disallowed.—Examination under Rule 566 of a clerk in a Toronto warehouse who had accepted a bill of exchange on behalf of his employer who resided in Philadelphia, U. S., and the employer denying the authority of the clerk to accept, was disallowed (*u*).

And in an action upon an accident insurance policy, payable to the personal representatives of the assured, brought by the administratrix, the assured having been accidently drowned, the defence raised was that the insur-

(*s*) *Russell* v. *Macdonald*, 12 P. R. 458 (1888).
(*t*) *Minkler* v. *McMillan*, 10 P. R. 506.

ance had been effected by one H. T. V., a brother of the deceased who had no insurable interest in his life, merely as a speculation, and that the action was brought for his benefit; the defendants, after issue, moved under Rules 224, 285, O. J. A., for an order to examine H. T. V., but the motion was refused by the learned Master in Chambers, holding that the defendants were not entitled to examine H. T. V. merely to ascertain his knowledge of the circumstances under which the insurance was effected, which decision was affirmed, on appeal, by the learned Chancellor (*v*).

And where the object was to obtain discovery from a witness before trial, an order had been obtained in Chambers under Rule 285 O. J. A., now 566, that C. H. the general manager of the O. Bank should attend before a special examiner and submit to be orally examined touching the amount of stock of that bank held in the name of H. S. S. in trust, and that he should bring with him and produce all books, powers of attorney, cheques, and other documents connected with the stock so held in trust and in question in this action; and that the examination should be filed and that an office copy or copies of it might be given in evidence at the trial. C. H. had no interest in the action; he was simply in the positon of any person liable to be called upon as a witness at the trial. It was not an examination *de bene esse*. In allowing an appeal from that order Ferguson, J., held that the meaning of the Rule did not comprehend authority to make such an order when no greater necessity for making it appears than the convenience of the party in preparing his case for trial (*w*).

Officers of Corporations.—The question as to who is an officer of a corporation for the purposes of discovery, had been considered in many cases under the Ontario Judicature Act up to the time when *Leitch* v. *Grand Trunk R. W.*

(*u*) *Rosenheim* v. *Silliman*, 11 P. R. 7.

(*v*) *Vidal* v. *Accident Insurance Company of America*, 7 C. L. T. Occ. N. 166.

(*w*) *Carnegie* v. *Federal Bank*, 10 P. R. 69 (1883).

Co. (*x*), came before the Court of Appeal. The assistant or sub-editor of a newspaper had been held an officer of a defendant company within the provision of R. S. O. 1877, c. 50, s. 156, now Con. Rule 487 (*y*). So with a station master of a railway company (*z*); the local agent of a fire insurance company, who received the application and premium, and issued the *interim* receipt (*a*); the local agent of a life insurance company (*b*); the driver of a traction engine belonging to a city (*c*); a local appraiser of a loan company, who had made a valuation of certain land upon which the plaintiffs advanced money (*d*), and the locomotive superintendent, and locomotive foreman of a railway corporation (*e*); but in none of them was the question so fully considered as in *Leitch* v. *Grand Trunk R. W. Co.*, in which the line may be said to have been drawn, and a test applied, to which the solution of the question might in all cases be referred. The result of that case was that the conductor of a train of the defendants, upon which plaintiff was injured through the alleged negligence of defendants was held to be an officer within the meaning of the rule. Burton, J.A., was of opinion that, notwithstanding the generality of the language used in the Act and in the Rule, the only officers intended were such as might under the former system have been properly made defendants, for discovery only; quoting Mr. Justice Strong to the effect that "it is ordinarily a good objection to a bill of discovery, that it seeks the discovery from a defendant who is a mere witness and has no interest in the suit, for as he may be examined in the suit as a witness, there is no ground for making him a party to a bill of discovery, since his answer would not be

(*x*) 12 P. R. 671 (1888); 13 P. R. 369 (1890).
(*y*) *Maitland* v. *Globe Printing Co.*, 9 P. R. 370.
(*z*) *Ramsay* v. *Midland R. W. Co*, 10 P. R. 48.
(*a*) *Goring* v. *London Mutual Fire Ins. Co.*, 10 P. R. 642.
(*b*) *Hartnell* v. *The Canadian Mutual Aid Association*, 12 P. R. 401.
(*c*) *Odell* v. *City of Ottawa*, 12 P. R. 446.
(*d*) *Imperial Loan Co.* v. *Baby*, 8 C. L. T. 190.
(*e*) *Moxley* v. *Canada Atlantic R. W. Co.*, 15 S. C. R. 145.

evidence against any other person in the suit." Maclennan, J.A., considered that the Rule "ought to be applied to every case coming fairly within the language employed, and that it ought not by construction to be limited to the higher or governing officers only," and "that the conductor is just the officer, of all others, from whom the plaintiff might reasonably expect to obtain useful discovery in such a case. He is the officer who represented the company, and was acting for them, on the occasion when, and in the business out of which, the cause of action arose."

Osler, J.A., in arriving at what is held to be a test of the propriety of interrogating any particular officer, traces the practice from the former to the present system, and points out that "instead of the right to administer interrogatories to the opposite party, or the officer of a body corporate, merely upon matters respecting which discovery might be lawfully sought, there is now the right to examine the party, or any of the officers of the body corporate (if a corporation is the adverse litigant), *touching the matters in question in the action*"; and adopting the language of Lord Fitzgerald in *Lyell* v. *Kennedy* (*f*) as to the intention of the Legislature to give to the litigant in all cases "the right to interrogate his adversary as to every relevant matter on which he could examine him if he thought fit to call him as his witness on the trial of the cause," the learned Justice of Appeal proceeds as follows:—"The Statute says 'any officer,' and if these words are cut down to mean general manager, director, president, or other principal officer, who in actions of this kind are precisely the officers who know the least, and who usually know nothing useful of the matters in question in the cause, I can only say that in my humble opinion we practically repeal the section as regards such cases;" and quoting from the judgment of Lord Eldon in *Drummond* v. *The Corporation of Chippenham* (*g*), that "the practice is settled, admitting an exception in the case of a corporation

(*f*) 8 App. Cas. 233, 234.
(*g*) 14 Ves. 245, at pp. 252, 254.

whose officers and servants are made parties. . . The reason of making the clerk or officer a party is that generally he is the person who can give the information"; and also the language of Jessel, M.R., in *Berkeley* v. *Standard Discount Co.* (*h*), viz.: "My own practice has been, not to direct a member to answer, if it be shown there is an officer who could answer, that is, who had a competent knowledge of the facts;" and also referring to other cases lays down that:—"The test therefore, even under the former practice, of the propriety of making any particular officer or even servant, of the corporation, a party, or of interrogating him, seems to have been his ability to give the necessary information, and that, in my opinion, is the test which is still to be adopted, although the Rule limits the right to the examination of some one who may be described as an officer. . . It may sometimes be difficult to draw the line between an officer and one who is a mere servant of the company; yet a person who is entrusted with the charge of a railway train in the course of its transit—the conductor of the train—is, in my opinion, as to that particular occasion, and for that particular purpose, to be regarded as an officer of the corporation as distinguished from a mere servant, no matter how temporary his employment, or how summary the company's power of dismissal."

As to persons who are not officers of the corporation within the Rule, in *Knight* v. *Grand Trunk R. W. Co.* (*i*), it was held that the track foreman, a switch foreman, and two engine drivers in the employ of the defendant company were not officers of the company examinable under Rule 487 in an action for damages arising out of a railway accident; which decision was followed in *Leitch* v. *Grand Trunk R. W. Co.* (*j*), as to a servant of the company who was driving the engine.

And in a more recent case it was objected that a person employed by defendant company as foreman of a gang of

(*h*) 13 Ch. D. 97.
(*i*) 13 P. R. 386 (1890).
(*j*) *Ibid.* 388.

men on bridge work was not an officer of the company examinable for discovery; and effect was given to the objection in an action instituted by one of the men for damages for alleged negligence by which he had received bodily injury during the work. It appeared on affidavit that the company's engineer had sole charge and superintendence of all bridge work in his division, including this work, but was not present at the time of the accident, and it was further held that his absence did not make the person in temporary charge examinable (*k*).

In granting such discovery the Court will in certain cases direct that the examination of the officer of the corporation be not received in evidence against them at the trial, that it is to be used for discovery only (*l*).

A corporation may, by Rules or Regulations of its own, imposing duties and responsibilities upon an employee, render him liable to examination for discovery as an officer within the meaning of Rule 487 Con. Rules, although but for such regulations he would not be so examinable (*m*).

The default of an officer of a defendant corporation, (in this case a railway conductor) in not submitting to examination for discovery, is not ground for a motion to strike out the defence of the corporation. The remedy is against the defaulting officer (*n*).

Production of Documents: Privilege.—In an action for damages for injuries in a railway accident, the defendants, having in their possession a certain report of an investigation held by them immediately after the accident, and the memoranda of the evidence taken at the investigation, claimed that they were privileged; but it appearing from the evidence of H., an officer of the defendants, who was examined for discovery, that they were not obtained for

(*k*) *Thomas* v. *The G. T. R. Co.*, 12 C. L. T. Occ. N. 42 (1892).

(*l*) *Hartnett* v. *The Canadian Mutual Ins. Assn.*, *ante*.

(*m*) *Leach* v. *G. T. R. Co.* (No. 2), 13 P. R. 467 (1890).

(*n*) *Badgerow* v. *G. T. R. Co.*, 13 P. R. 132 (1889); *Central Press Assn.* v. *American Press Assn.*, 13 P. R. 353.

their solicitor, nor for the purpose of being laid before him, for advice, nor in view of any impending or threatened litigation, nor after litigation had commenced, but "for the purposes of the management of the line"—the Court held, following *Wheeler* v. *Le Marchant*, 17 Ch. D. 675, and *Westinghouse* v. *Midland R. W. Co.*, 48 L. T. N. S. 462, that the documents were not privileged and should be produced (*o*).

The "Repairs Book" of a railway company in which it was the duty of an officer of the company to make entries as to the state of repair of the locomotive was held not to be privileged (*p*).

In an action to recover back payments made by the plaintiffs to the defendants, who were contractors for the building of the plaintiffs' line of railway, on the ground that the progress certificates upon which the payments were made were false and fraudulent, it was held, on appeal, that documents shewing the results of measurements and surveys made by the plaintiffs for the purpose of litigation were privileged from production, even if they were procured for the purpose of another action between the same parties; but that information obtained by means of the measurements and examination of the company's surveyors was not *per se* privileged and the plaintiffs were therefore ordered to give particulars of the errors in the certificates on which they relied, although this might involve the disclosing of matters of fact derived from privileged communications (*q*).

In an action on a Fire Insurance Policy defendant's affidavit on production set out as documents which they objected to produce:—"Report of adjuster for Norwich Fire Ins. Society for counsel's opinion thereon." "Various memoranda taken by adjuster for preparation of report, and for information of counsel." It was further stated in

(*o*) *Betts* v. *Grand Trunk R. W. Co.* 7 C. L. T. Occ. N. 155 (1887).

(*p*) *Moxley* v. *Canada Atlantic R. W. Co.*, 11 P. R. 39; S. C., 15 S. C. R. 145.

(*q*) *Canadian P. R. Co.* v. *Conmee*, 11 P. R. 297.

the affidavit that these documents were "privileged, being part of the defendant's case, and prepared for the instruction of counsel, and prepared especially for this litigation and in contemplation thereof." These documents were, on appeal from an order of the Master in Chambers, held to be privileged from production (*r*).

In an action to set aside a transfer of certain promissory notes made by one S., from the defendants W. and Y., to their co-defendants, as fraudulent and void as against the plaintiffs and the other creditors of W. and Y., upon examination of I. H. P., assistant general manager of the defendant the M. Bank, on motion for injunction it was admitted that letters relating to the matters in question from G., a solicitor, were in the possession of the Bank. G. was general solicitor of the Bank, but in this transaction was also solicitor for W. and Y. and S., and had himself agreed to endorse the notes in question. In answer to the usual order to produce an affidavit was put in by the Bank mentioning the letters but claiming privilege for them. An order was made in Chambers for their production notwithstanding the claim. The Bank then put in an affidavit producing two of the letters, and claiming privilege for four. The Master made an order for production of these letters also, following *Follett* v. *Jefferyes*, 1 Sim. N. S. 1; and *Queen* v. *Cox*, 14 Q. B. D. 153. This order was affirmed by the Chancellor, on appeal (*s*).

In an action for damages arising out of the arrest, at the instance of the defendant company, of the plaintiff, who was at one time the Toronto agent of the said company, the company claimed privilege from production for certain letters on the ground "that they were written in anticipation of litigation, and contain references to the advice given by the company's legal advisers in the matter of the prosecution of the plaintiff, and were written after consultation with said legal advisers." It was held by the learned Master in Chambers that the letters were protected (*t*).

(*r*) *Macdonald* v. *Norwich Union Fire Ins. Co.*, 10 P. R. 501.
(*s*) *Pawson* v. *Merchants Bank*, 11 P. R. 18.
(*t*) *Boughton* v. *The Citizen Ins. Co.*, 11 P. R. 110.

The names of persons giving information to police officers upon which they make an arrest, cannot be withheld upon examination for discovery before trial, on the ground of privilege, in an action instituted by the person arrested against the officers for malicious prosecution (*u*).

In an action to establish a will which the defendants impeached for want of testamentary capacity, and set up a prior will, the defendant included in his affidavit on production copies of letters from himself to the testatrix, but objected to produce them for inspection on the ground that they were never mailed or sent to their destination Their materiality and relevancy to the issues was not disputed. It was laid down by the Chancellor that all memoranda and writings or pieces of paper with writing on which may throw light on the case, whether they would or would not be evidence *per se*, are subject to production unless they can be protected, and the mere fact in the case of a letter, that it was not forwarded to its destination, is no ground of exception. The only ground of excuse is privilege (*v*).

Upon examination of a defendant, who was administrator of the estate of his deceased wife, for discovery before trial, he answered questions as to certain conversations between himself and his wife bearing upon the matters in question, and declined to answer further on the ground that he was not compellable to disclose any communication made to him by his wife during the marriage; and it was held, *per* Street, J., that it was competent for him at any time to claim the rights which the statute gave him, R. S. O. cap. 61, sec. 8, and to refuse to disclose anything further in the nature of communications (*w*).

Copies of certain patents material to the defendant's case in an action to restrain the infringement of a patent,

(*u*) *Humphrey* v. *Archibald*, 12 C. L. T. Occ. N. 36 (1891).
(*v*) *Cameron* v. *Cameron*, 10 P. R. 522 (1885).
(*w*) *Connolly* v. *Murrell*, 14 P. R. 187.

which were procured by his solicitors of their own motion for the purposes of the action were held privileged from production (*x*).

The penal provisions of the statute 13 Eliz. cap. 5, afford no excuse for a refusal by a defendant in an action brought to set aside a fraudulent conveyance, to answer questions put to him regarding the fraudulent transaction (*y*). But no man can be compelled to answer a question incriminating himself (*z*).

Although privilege has not been claimed before the examiner, it may be claimed on a motion to commit for refusal to answer (*a*).

Upon examination of a party under Rule 566 at a stage of the action earlier than an examination will be ordered as of course, only material documents should be produced, such as would be produced in the ordinary course at a later stage (*b*).

It will have been observed that in some of the cases quoted, the judgment turned upon the question as to whether the discovery sought was necessary for the purposes of justice. In one of them (*c*), it was said that the mere convenience of the party in preparing his case for trial does not bring the case within the rule.

Married Women's Separate Estate.—Where the action was upon the covenant of the defendant, a married woman, and the statement of claim alleged that she was possessed of separate estate, and upon examination for discovery before trial, she declined to answer questions as to what separate estate she had at the time she made the covenant, it was held on appeal, affirming the order of the learned Master in Chambers, that the plaintiff had the right to the discovery sought under the wide terms of Rule 487 (*d*).

(*x*) *The Guelph C. Co.* v. *Whitehead*, 9 P. R. 509 (1883).
(*y*) *Dunsford* v. *Carlisle*, 10 P. R. 449.
(*z*) *Hall* v. *Gowanlock*, 12 P. R. 604.
(*a*) *Ibid.*
(*b*) *Orpen* v. *Kerr*, 11 P. R. 128.
(*c*) *Carnegie* v. *Federal Bank*, *ante*.
(*d*) *Kennedy* v. *Bowes*, 11 C. L. T. Occ. N. 281 (1891).

Where the right to discovery depends upon some other right being first established.—In an action in which the plaintiff charged fraud in obtaining a will, which charge, if established, would have enabled the plaintiff to claim a share of the estate as one of the heiresses at law, it was considered that the right to discovery and inspection, or production of documents, depended upon the question as to the will being determined in the plaintiff's favour; and not having been so determined, discovery and production were refused (*e*).

So where in an action by persons interested in an estate, against executors and residuary legatees under a will, claiming a declaration that, because of the interlineation of the word "between" in a certain part of the will, made as alleged after the will had been signed by the testator, it should not be admitted to probate, and further claiming administration and partition of the estate, an order directing defendants to produce the mortgages and other securities and books come to their hands as executors had been taken out, it was held upon appeal until the plaintiffs had established the alteration charged, the application for discovery was premature (*f*); referring to *Leitch* v. *Abbott*, 31 Ch. D. pp. 377-9, *Fennesy* v. *Clark*, 32 Sol. J. 74, in which latter case Cotton, L. J., states a general principle as follows: "The Court is always unwilling, if it could see that an injury might be done to a defendant, to order him to make discovery which would be of use to the plaintiff only if he should succeed in establishing his right to relief before he had established that right."

(*e*) *MacGregor* v. *McDonald*, 11 P. R. 386.
(*f*) *Hurst* v. *Barber*, 12 P. R. 467 (1888).

ALFRED HOWELL.

TORONTO.

EDITORIAL REVIEW.

The Economy of the Law Society.

The writer, desiring to look at Read's "Lives of the Judges" the other day, asked the Librarian whether there was a copy in the Library. "There," said he, pointing to an expanse of green picked out with gold on a few neighbouring shelves, "are one hundred copies; if you want any more we have another hundred stored away in another room."

Some of us would like to know why so many copies were bought. But we do not know whether we should apply to the Finance Committee, the Library Committee, or the Discipline Committee. The enquiry might commence in either the first or second, but would be pretty sure to end in the third.

Can a Judge Return to Practice?

An English contributor having mooted the question in our last regular number, we might say, for the benefit of our English brothers, that two Ontario Judges have returned to practice, one being the Attorney-General of the Province; and one Nova Scotia Judge, who is Attorney-General of Canada. It is a little awkward, of course, to cite a decision of "a late Vice-Chancellor" against Mr. Attorney; and still more awkward for Mr. Attorney to cite "a late Vice-Chancellor" in his own favour. The story goes that shortly after the return to the Bar of the Attorney-General of Ontario, he advised a demurrer to a bill, and on the argument was confronted with a decision of his own overruling a similar demurrer. The writer cannot verify the story, and perhaps the Attorney-General will not think it worth while to deny it. But it points a moral.

A story is at present going the rounds as to the Attorney-General of Canada. When on a recent visit of inspection to a penitentiary, a convict asked him to consider the shortening of his sentence. After hearing his story he asked him what his sentence was. "Fourteen years," was the reply. "Well, that is rather severe. By the way, who sentenced you?" continued the Attorney-General, Sir John Thompson. "Judge Thompson," was the reply.

"Retired Judges" in Ontario are by Statute *ex-officio* Benchers of the Law Society; and a Judge who has returned to practice is a "retired Judge" within the meaning of the Act.

The ratio which a Judge's salary in Ontario bears to the income of a leading counsel is as one is to five or six; which helps to make the descent easy.

Citation of the Law Reports.

When the mode of citing the Law Reports was altered in 1891, it was generally, though it now appears erroneously, supposed that the numbering of the volumes would run on as before. In 1892, however, we find another series of one, two and three coming out. A more fantastic and irritating mode of citation could not be devised. "Law Reports of 1891, 1 Ch. p. 1," makes a very decent half-line, and hardly anything less will give a clear and unambiguous notion of what is meant. It makes one sigh for the days of the Reporters.

This is the modern mode of citation :—

Mr. Baggs, Q.C.—I refer, my Lords, to 1 Q. B. '91, p.——

The C.J.—One moment, Mr. Baggs, do you mean the Upper Canada Reports?

Mr. B.—Oh, no, my Lord, the English ——

C.J.—Oh, yes, yes—yes, yes, 1 Ad. & El. N. S.—what page did you say Mr. Baggs?

Mr. Justice Senior (in a stage whisper).—The Law Reports, Chief, the Law Reports.

C.J.—You mean a decision of the Queen's Bench *Division*, Mr. Baggs?

Mr. B.—Yes, my Lord, 1 Q. B.——

C.J.—Wait now, 1 Queen's Bench Division ——

Mr. B.—Not 1 Queen's Bench *Division*, my Lord ——

C.J.—Why, Mr. Baggs, did not you say this moment that it was a decision of the Queen's Bench Division?

Mr. Justice Junior (in a stage whisper).—The Queen's Bench Division of 1891, Chief.

C.J.—Oh, yes, yes, Mr. Baggs. I beg your pardon, yes, yes, 1 Q. B.—p. 91, you said, I think.

Mr. Baggs.—No, my Lord, not *page* 91—1 Q. B. *1891*, at p. *one*, that is the Law Reports of 1891, volume 1 Q. B. at p. 1.

"Or this canticle":—

Mr. Baggs, Q.C.—I refer, my Lords, to 1 Ch. 1891, ——

C.J.—One moment, Mr. Baggs; do you mean Grant's Chancery ——

Mr. B.—Oh no, my Lord, the Law Reports.

C.J.—Oh, yes, yes, Law Reports, 1 Chancery Appeals. What page Mr. Baggs?

Mr. B.—Not Chancery Appeals, my Lord, ——

C. J.—What! Didn't you just say Law Reports, 1 Chancery?

Mr. B.—I mean, my Lord, the Chancery Division.

C.J.—Why, Mr. Baggs, you said 1 Chancery.

Mr. B.—Yes, my Lord, but I meant the Chancery Division reports.

C.J.—Well, well, 1 Chancery Division.

Mr. B.—Not 1 Chancery *Division*, my Lord—1891, 1 Chancery ——

C.J.—*Page* 91, did you say?

Mr. B.—No, my Lord, I refer to the new series—the Law Reports of 1891, volume *one* of the Chancery Division, page 1.

The only thing approaching this is the mode of citing Roman law from the Digests.

Piracy.

We most gladly print at another page Mr. Soule's letter, explaining that the American reprint of Talbot & Fort's Index is by arrangement with the English publishers. We are exceedingly glad to find that Mr. Soule is supplying by his exertions the want of a fair international arrangement as to copyright.

It is a pity that the facts were not fully stated by the *American Law Review*.

CORRESPONDENCE.

To the Editor of THE CANADIAN LAW TIMES.

Talbot & Fort's "Index."

DEAR SIR,—In your issue for March, 1892, on page 72, you accuse us by inference, of republishing Talbot & Fort's "Index of Cases Judicially Noticed," without the consent of the English author or publishers; and you apply to us in three places the term "pirates."

As a matter of fact, we bought from the English publishers an edition for the American market, and issued it here without even changing their title page or adding our own imprint. In binding up the copies thus regularly bought and imported, we used as an outside title "English Citations, 1865-1890," because the publication of several volumes of "Citations" in different states had familiarized American lawyers with that term, and it explained to them more clearly than the English title would have done, the character of the book.

Allow us to point out, that without any accurate information or inspection of the volume—merely from reading a casual notice in the *American Law Review*,—you have committed as grave an injustice to our reputation, as a real piracy would have inflicted upon the English authors and publishers.

We ask you to give this letter,—or a proper retractation —equal prominence with your article on "Piracy."

Yours faithfully, The Boston Book Co.,

CHARLES C. SOULE, President.

BOOK REVIEWS.

A Manual of County Courts Practice in Ontario, etc. By M. J. GORMAN, LL.B., of Osgoode Hall, Barrister-at-Law. Toronto: The Carswell Co. (Ltd.), 1892.

One would hardly believe, before looking into this book, that so much that is peculiar to the County Courts had accumulated. Mr. Gorman's manual contains all the extracts from statutes imposing additional duties on County Court Judges, and such of the Rules of Practice as specially apply to them, in addition to the full text of the statutes directly bearing on these Courts. Very full notes of the decisions in our different provinces are inserted under the sections of the statutes affected, as well as English decisions. In order to bring in the very latest decisions, Mr. Gorman has referred to the daily newspapers in some instances. A more full annotation could not have been made.

We must, especially as the preface invites it, suggest that it is rather confusing to have the U. C. R. cited as Q. B. It is always best to cite reports as they are known, and not to make use of a mode peculiar to oneself.

CARLETON LAW ASSOCIATION.

Annual Report, 1891.

To the Members of the County of Carleton Law Association :- -

Gentlemen,—

The Trustees in presenting their Fourth Annual Report to the Association take great pleasure in again reporting that the affairs of the Association are in a prosperous condition, and that the objects for which the Association was formed are being attained. Annual fees to the amount of $232.50 have been paid, and in addition to the grant of $226.50 from the Law Society, the Association has also received a Provincial grant of $62.50. After expending $567.95 in the purchase of books for the library and after paying the other necessary expenses of the Association there remains a balance on hand of $178. In view of the amount of this balance and considering the large proportions the library has now attained your trustees have not deemed it advisable to contract the loan from the Law Society which you at the last annual meeting authorized them to do.

The library now contains 1003 volumes, of which 126 volumes were added during the year. The books purchased for and now in the library apart from those presented to the Association represent a value of about $3,000, for which amount your trustees have placed an insurance thereon. None of the books have disappeared during the past year owing principally to the carefulness of the librarian, Miss Kealy, whom your trustees engaged in compliance with your direction to appoint a librarian. In

addition to taking care of the books in the library the librarian has noted up in the Revised and Consolidated Statutes the amendments of subsequent years.

The trustees have to report as a matter of regret that the membership is less than last year, two of the members, Messrs. C. H. Pinhey and T. G. Rothwell, having withdrawn from the Association, while no new members joined during the year. It is suggested that your Association should consider the matter with the view of devising means of inducing at least some of the large number of the profession of Ottawa who are not now members to join the Association.

Your trustees desire to congratulate the Association on the election of one of your members, Mr. A. J. Christie, Q.C., as a Bencher of the Law Society at the election of Benchers last March. While perhaps the city of Ottawa is entitled to more than one representative yet before your Association was formed it appears to have been impossible to appoint even one representative from Ottawa. Another advantage derived from the formation of your Association was apparent in the long list of important cases set down for hearing at the recent Winter Assize, which extra sitting of the court at Ottawa was arranged for in the first instance by your Association.

During the year Mr. Winchester inspected the library and books of your Association, when he expressed himself as much pleased with everything in connection therewith.

Your trustees refer to you for your consideration correspondence received relative to the more complete fusion of the different divisions of the Courts, and also in reference to the feasibility of requesting the Law Society to supply to the profession the Supreme Court Reports in the manner in which they supply the Ontario Reports.

F. H. CHRYSLER.
President.

J. M. BALDERSON,
Secretary.

REVIEW OF EXCHANGES.

Law Journal.—23rd August, 1890.

Donatio Mortis Causa. A number of cases are cited on various points.

Ibid.—18th October, 1890.

Interest. Some cases on the liability for interest, with reference also to the date from which it should run, as damages.

Ibid.—1st November, 1890.

Recent Changes in the Legal Position of Married Women. A sketch of recent legislation relating to the wife's right to the custody and society of her children, her right to divorce, her capacity as a witness, her right to property, etc.

Ibid.—22nd November, 1890.

Share Certificates under Forged Transfers. After citing some cases, the learned writer reaches the following conclusions:—Where on a void transfer the company issues a certificate to A., on the faith of which B. buys from A., B., if dispossessed by the real owner, can recover damages from the company, which has no right of indemnity against A.; but the registration of, or issue of a certificate to A., gives A. no similar right against the company, except under very special circumstances. Other points are also discussed.

Ibid.—29th November, 1890.

Abatement of Legacies. A number of cases on various points cited.

Ibid.—6th December, 1890.

Illicit Profit by Agents. The remedies of a principal whose agent has received a bribe are said to be as follows:—He may rescind the contract if he comes in time; he may sue the agent for damages for breach of duty, and the damages will not be limited to the amount of the bribe; he may sue for the amount of the bribe as a debt, but cannot follow it as trust money; if the bribe has been promised but not paid, the principal may adopt the contract and sue for the sum promised to the agent.

Ibid.—13th December, 1890.

Personal Trade Names. After citing a number of cases, the learned writer concludes:—"A trader who adopts as his business name that which is an accurate statement of an existing state of facts—*e.g.* his own name if trading alone, or his own if in combination with those of his partners, or a comprehensive description of them—cannot in the absence of fraud, be restrained from so doing."

Ibid.—20th December, 1890.

The Personal Nature of Implied Covenants. After citing several cases upon the relationship of landlord and tenant, where the landlord's estate is limited (as for life), and there is no express covenant for quiet enjoyment, the learned writer concludes:—"The result of these cases is that, where there is only an implied covenant, the person who was lessor is liable to no damage for breach of the covenant for quiet enjoyment if the breach has occurred after the interest of such person has terminated; in other words, as no man is called upon to do more than he can, so when a man's interest in a set of premises ends he is no longer called upon to guarantee a quiet enjoyment. This rule is of universal application, applying equally to a deed, an agreement in writing, or only a parol agreement."

Ibid.—27th December, 1890.

An Inn-Keeper's Lien and Liability. A few modern cases are cited.

Ibid.—7th February, 1891.

American Railroad Share Certificates. To effect a transfer and perfect the title the law of the State must be observed; but as between parties to the transfer the *lex loci contractus*. From a number of cases cited the learned writer deduces the following conclusions:—First, the registered owner who leaves the share certificate unsigned with his agent, without authority to pledge or sell, is not estopped from asserting his title as against an innocent holder for value to whom it has been fraudulently delivered by the agent. Secondly, in the like case, if the certificate has been signed by the owner, and so left with the agent for safe custody, he is estopped; but executors who sign merely for the purpose of obtaining their own registration are not estopped. Thirdly, it is an open question whether the doctrine applies to the case of an unregistered owner with the transferee's name in blank, but signed by the last registered owner, except that the innocent holder may fill in his own name as transferee, and get himself registered as owner.

Ibid.—14th February, 1891.

Inn-Keepers and Guests. Some authorities on the relationship are cited, and especial notice is given to *Medawar* v. *Grand Hotel Co.*, where the plaintiff was shown to a room already engaged in order to dress. He left a jewel case on the dressing table, and went out returning late in the evening. On asking for his room he was told that he had none; but that the persons who had engaged the room in which he had dressed had arrived. His luggage had been removed, and when brought to him in another room which had been assigned to him he found that some of his jewellery was missing. The Court of Appeal held him entitled to judgment.

Ibid.—21st February, 1891.

The Liability of Solicitors in Investing Trust Funds. Several cases reported in 60 L. J. Ch. 66, *Blyth* v. *Fladgate*, *Morgan* v. *Blyth*, and *Smith* v. *Blyth*, are discussed, and are most useful cases on the duties and responsibilities of solicitors.

Ibid.—14th March, 1891.

Contribution Between Trustees. The cases of *Blyth* v. *Fladgate*, and two others, 60 L. J. Ch. 66, discussed in the number of 21st February last, are again discussed on the above point. Other cases are cited; and the learned writer arrives at the following conclusions:—"Where a breach of trust has been committed, all the trustees are liable to their *cestuis que trust*, and also are equally liable as between themselves, unless any one of them has an independent right to an indemnity from his co-trustee or co-trustees, as he would have if the latter acted professionally for the trust, and caused the breach of trust by his negligence."

Ibid.—25th April, 1891.

Injunctions in Restraint of Libel. A case of *Bonnard* v. *Perryman* is discussed, and a strong plea made for the exercise of the restraining jurisdiction in cases of libel.

Relief for Mistake. Some remarks upon the case of *Barrow* v. *Isaacs*, L. R. (1891) 1 Q. B. 417, where the Court of Appeal held that it was powerless to relieve against the forfeiture of a lease occasioned by an assignment without leave, where the leave would have been granted if asked for, but the lessee's solicitor forgot to ask it.

Ibid.—9th May, 1891.

Cases under the Trustee Act, 1888. A collection of cases under the Act as to investments of trustees, largely reproduced in the Ontario Act, 54 Vict. cap. 19.

Deserted Husbands. Several cases on the rights of separated spouses are cited.

THE CANADIAN LAW TIMES.

MAY, 1892.

THE SUPREME COURT OF JUDICATURE AND ITS DOMESTIC AFFAIRS.

Uniformity of Practice.

THE lawyer is ever the gentlest critic of the laws of his country, the Judges who expound them, and the mode in which they are administered; and yet, of late, it has been the fashion to question many things possessing all the sanctity which custom can give. The inference is that the criticism is not merely captious, but has reference to matters which call with a considerable degree of urgency for amendment.

Where laws fail to attain their object legislation is obtainable with reasonable facility, and no one complains that the volume of the enactments which crowd our statute books is insufficient. But apart from case law and statute law there is a branch of the administration of justice where our judiciary is all-powerful, and which, measured by any standard you please to apply, does not lack importance.

It is as essentially necessary for an adviser to know precisely the means by which he may attain justice for his client, as to be familiar with the abstract principles of law which apply to and govern his client's case. And yet, during the progress of a litigation, he is obliged from time to time to take leaps in the dark—alighting on his feet when the Goddess of Chance so wills it.

It has been said, "It is more important that practice should be uniform and certain than that it should be right" (L. R. 1891, 3 Ch. 492), and with what yearning the practitioner longs for that certitude! But while in matters of law one Judge treads close on the heels of another, in matters of practice he delights to shew the originality and independence of his mind, if indeed he deems the subject worthy at all of an exercise of mental power.

Lawyers have no selfish end to gain in this matter. They merely wish to be able to advise their clients aright, to obtain for them what they are entitled to, and to save them the chagrin and expense of useless and ineffectual proceedings. They are the buffers between the Court and the public, and are necessarily sensitive to every jar on the road to justice. Accordingly, when they call attention to irregularities and defects, they are by virtue of their position entitled to be heard.

Taking as a text the dictum above cited, what they chiefly desire is uniformity and certainty. We have a practice that is in many respects cumbrous and antiquated; but it is the trade of the lawyer to be familiar with it, and he can adapt himself to the most absurd and round-about method of reaching his object if that method is capable of being ascertained with definitiveness. How often, as matters now stand, does he feel himself utterly at sea? His client wishes to know whether he can have a speedy judgment, or a judgment upon his opponent's admissions, or can have his case tried by a jury, or can examine for discovery, or strike out an embarrassing pleading, or take some other step in his action. Who will venture to give him a categorical answer?

Take the case of an embarrassing pleading, and observe the two lines of reasoning which have been followed out to their logical conclusion.

It is alleged that the pleading is embarrassing.
Embarrassing pleadings must be struck out.
The pleading is bad in law.
Every pleading that is bad in law is embarrassing.

Therefore this pleading is embarrassing, and

(*a*) Must be struck out.

(*b*) Must be demurred to because though embarrassing it is also and primarily bad in law.

It costs your client many a dollar to find the conclusion to *that* syllogism.

Or, take the case of a demurrable pleading simply. The practitioner is often put in this awkward position—if he demurs, he may be told that all these matters now go to the trial. If he does not demur, he may go to trial only to be told that he ought to have demurred, and he gets the costs of a successful demurrer only.

Besides uniformity and certainty there is, of course, something else to be desired, and that is a more liberal and modern interpretation of the practice. It is not amiss here to pay a tribute to the much appreciated efforts of the Master in Chambers in this direction. Suddenly confronted by a new, heterogeneous, and undigested system, he has done infinitely more than anyone else in the direction of producing a unified and intelligible code, and the results of his labours will long be remembered and valued by the profession to which he has rendered such lasting and considerable service.

We affirm that the object of a practice is not primarily to convenience the Court, or to save it labour in the consideration of cases; but to insure to the suitor the most rapid, simple and uniform method of attaining the rights to which he is entitled. Judicial astuteness would be far better exercised in striving to render that practice expansive and elastic, than by employing it as a means to side-track cases and escape the labour of their consideration. It apparently costs a Judge no pang to refuse an application because some trifling and unimportant formality has not been complied with; nor does he wait to consider what this may mean to the careful and conscientious solicitor whose only error has been the following of a course of practice sanctioned elsewhere by length of time, or even express decision. The client's pocket, or may be the solicitor's,

suffers seriously, and the solicitor, as to explanation, is hung upon the horns of the uncomfortable dilemma—his own ignorance or the Judge's whimsical mood.

Perhaps such things are inevitable where every Judge on the Bench of the High Court has his turn at making or marring the practice, and if so these remarks emphasize the necessity for a Weekly Sittings in all the Divisions, presided over by one Judge, whose personal equation once mastered, solicitors will be at ease.

Fusion of Offices.

The Consolidated Rules apparently provide that there shall be one Central Office in Osgoode Hall where papers intituled in all the Divisions are to be filed, and the various matters referred to in Rule 23 attended to. It is curious to note that since the passing of these Rules the Registrars of the Common Pleas and Queen's Bench Divisions and their clerks have presumably acted on the assumption that there was a Rule similar in terms to Rule 23 governing their respective offices. This is of course not the case, but Rule 23 deals with the office of the Clerk of Records and Writs as being a fusion of the offices of all the Registrars. We must assume then that the Clerks in the offices of the Common Pleas and Queen's Bench Divisions are clerks in the office of the Clerk of Records and Writs—otherwise they appear to have no warrant for doing any of the acts covered by Rule 23 (*a*). Apart from this somewhat strained construction of the rule there is nothing elsewhere which appears to confer upon them power to so much as receive a pleading, or demand the cancellation of a ten cent stamp thereon.

Evidently then it was the intention of the framers of the Rules to consolidate the offices of the Registrars—so far as these functions are concerned—and evidently that

(*a*) Our contributor overlooks the fact that a Rule (unpublished), the fiat of the Judges, keeps in suspense all the Rules relating to fusion; it was thought at the time that they would soon after the consolidation be brought into force by the rescission of the suspending rule; but this has never been done.—ED.

intention has been in some inexplicable manner frustrated. Perhaps it would not be profitable to enquire the cause of this anomalous condition of affairs, but certainly it is worth while at this date to seek for a remedy.

That consummation devoutly to be wished—the fusion of the Courts—would practically necessitate a re-arrangement on these lines of the offices below; but quite independently of that fusion, a change is desirable and capable of being easily worked out.

Apart from the question of convenience one might found an argument upon the saving of expense which would necessarily ensue; but a Government which in many respects is careful of its revenues to the verge of stinginess, administers the affairs of Osgoode Hall without any apparent regard to economy.

The obstacles in the way of change seem to be chiefly the following:—The deep-rooted prejudice which adheres to time-sanctioned customs or even names, and fights doggedly and persistently against alteration. The necessity of a re-arrangement of staff and accommodation. Lastly, the question as to who should control the amalgamated offices.

Upon the second point it may be said that the Government has already caused an investigation to be made, and has ascertained that there is ample space at command to enable the scheme to be carried into effect and this with an expenditure quite insignificant. The last obstacle ought not to be insuperable. The simplest and neatest way to arrange matters would be to merge the Registrars' offices, in so far as they deal with the matters referred to in Rule 23, in the office of the Clerk of Records and Writs; but if a nominal control by one of the Registrars is advisable, the senior Registrar for the time being might be constituted the head of the Department with the Clerk of Records and Writs holding the position of Chief Clerk.

Is it worth while to make a change, and are the advantages flowing from it worthy of consideration? Passing the economical view of the question, it must be concluded

that undeniable benefits would flow from the alteration. All papers would be filed at the same place, and all motions there set down. The chances of documents going astray would be much lessened. Filings would be all retained in the same custody and not pitchforked from office to office till they reached their home. The necessity of endless requisitions would be done away with.

At present, if you have to put hands upon an affidavit used on a motion at Osgoode Hall ten years ago—having no further information than this, and the necessity for the document being urgent as it generally is—you have to search three sets of files in the Queen's Bench Division; three in the Common Pleas Division; two in the Chancery Division, and the files in Chambers as well. This is a reasonable afternoon's work as many of us know, and a "general search" is a fairly expensive luxury.

Again, when papers come from the country, or are handed out by a Judge, it is more curious than amusing to have to trace them to their ultimate resting place (*b*).

There are also aggravating minor differences of practice between the Divisions, all of which would be finally and forever done away with in event of amalgamation.

May we hope for it? It seems almost ridiculous to ask when the Rules passed several years ago will really be carried into effect. If the Registrars cannot agree on a basis, will not the Judges take the matter up, or is the intermediation of the Attorney-General the only remedy?

The Accountant's Office.

It is but a few years since a pocket-book sufficed to contain the accounts of the Court funds, and it is only recently that this branch of the administration of justice

(*b*) In some cases papers have been completely lost, as the Editor can personally testify. A Record from another Division tried by a Judge of the Chancery Division has many chances against its getting into the right place. There is a meaningless discussion as to whether it ought to be carried from the Judge direct to its own Division, or through the medium of an official of the Chancery Division.—Ed.

has expanded to its present proportions. Now, as everyone knows, we have an Accountant, a Chief Clerk and four subordinate clerks, and an appalling array of ledgers, and one may assume that the future will see a larger amount of money on deposit, an increased staff, and a more complex state of affairs to be dealt with. It is important then to inquire whether the present system satisfactorily answers existing needs and is capable of expansion.

Concededly there is only one individual—the Chief Clerk—who has a personal knowledge of the position of the various funds of which he is in charge. The books themselves, while carefully kept, do not shew on their face in every case precisely how an account stands, and frequently it is only by virtue of his personal knowledge of the matter that the Chief Clerk can produce order from chaos. This at once points to a serious danger. Were the Chief Clerk suddenly incapacitated, it would be impossible in a large number of cases to arrive at a true understanding of complicated accounts. It is unnecessary to do more than point out the delay, uncertainty and loss of time that must result. Moreover, even the Chief Clerk with his truly phenomenal memory is sometimes at fault, and amounts, in some cases, are overpaid or underpaid or paid to persons not entitled at all. Many practitioners will recall occasions when tedious investigations have been necessary, and where sometimes the Gordian knot has had to be cut at last by a compromise as to the ownership of moneys in Court—a compromise signed by the solicitors for the parties to protect the Accountant's office.

All this difficulty arises from a vicious system of book-keeping; and a little consideration will show how easily it may happen that a fund in Court can become so involved in complexities that it is next to impossible to ascertain the exact rights of the parties entitled to share in it.

In an infancy matter, for example, money is paid into Court; a doweress is entitled to a life interest in part of it; orders for maintenance are made from time to time; the position of the family continually changes; some members

of it die; shares are paid out to adults; costs are charged on different interests. After fifteen years of this it is small wonder that difficulties lie in the way of ascertaining the exact share to which one of the children is entitled upon his coming of age.

Some time ago it was seen that this matter required amendment, and an Infancy Ledger was begun. It is still incomplete, however, and such a ledger though it would effect a very useful object would not reach every case. The only satisfactory remedy is to open a separate account in the books for each individual who has been ascertained to be entitled to a definite sum, which sum has for some reason to remain in Court. There would then be no possibility of inadvertent encroachment on the shares of individuals—a thing now not at all uncommon—and a glance would show the precise position of every account. Money paid into Court should wherever it is possible be carried at once to the credit of the individuals who will ultimately be entitled to it. The original account might in many cases be closed, or it could be kept open for the purpose of entering there the orders affecting the fund. These would not have to be entered again under the name of each individual affected by them, but a reference to them would answer every purpose. The actual account would occupy a very small space, a page or two would always suffice for even the longest account, and it would not be necessary to run through several ledgers as is now done. It is true that there would always be the necessity of looking at two ledgers, namely, the ledger containing the account and the ledger containing the orders or reports affecting it, but this would be simple and satisfactory as compared with the tedious search which it is frequently necessary to make under the present system.

An alteration of this character would involve some additional labour at the outset, but the already large staff of the office ought to be sufficient for the purpose, and if not, the Accountant should have additional competent assistance.

In any case there should be another senior Clerk who could take the place of the Chief Clerk on emergency, and prevent the block which now occurs in the case of his illness or absence. Unless some one is educated to this position the time must come when a most critical and serious state of affairs will arise, and it would be indeed well to anticipate and provide for this contingency.

There is one other matter in connection with the Accountant's office which calls for alteration. We refer to the rule that præcipes must be put in by the 20th of June to entitle persons to cheques before or during vacation. This is a recurring hardship, and works great injustice. It is surely enough that præcipes for cheques cannot be received during July and August, without the imposition of this further unreasonable restriction. Individuals who are entitled to moneys in Court have rights which rank considerably higher than the convenience of officials who are, after all is said and done, servants paid by the public for the transaction of its business.

ANONYMOUS.

EDITORIAL REVIEW.

The County Libraries.

The County Law Associations which have been established have proved most successful in every respect. In the course of time every Court House in a County where an association has been established will have a well selected and well stocked library. In olden days when the verdict or ruling of a Judge at *nisi prius* was but the preparation of the case, so to speak, for more deliberate consideration by a higher tribunal a library was of little use. And the early system of disposing of Chancery cases, remarkable chiefly for the great deliberation with which the cause proceeded, enabled both sides to go to trial well prepared. With our present system a library is almost a necessity at the place of trial, unless in a case where the question at issue is purely one of fact. And both the Bench and practitioners have derived the greatest benefits from the existence of County libraries.

To the exertions of the profession in the different localities the establishments of the libraries is due, but at the same time we have to thank the authorities for a great deal of valuable assistance.

Owing, we believe, to the suggestion of Mr. W. F. Burton of Hamilton, an application to the government of Ontario for an annual grant towards the maintenance of the libraries was made and favourably received; and they are now enjoying the advantages of this supplement to their funds. We might suggest, further, that the government should supply free to the County libraries the statutes passed in each year. Every year many volumes of the statutes are sent to the Magistrates of the Province, to be passed on by them in many cases to students and others—

in many other cases to lie unused in their hands. Why should not the government put a copy of the statutes each year where it is most wanted, namely, in the Court House Library?

To the suggestion of the same gentleman, Mr. W. F. Burton, we are now indebted for another favour. He, with several members of Parliament, recently waited on the Minister of Justice and requested that the Dominion government publications should be presented each year to the County Libraries. The Minister received the deputation most kindly, and arranged that the Reports of the Supreme and Exchequer Courts of Canada, the Reports and pamphlets on Criminal Justice, the Statutes of Canada, Orders in Council, and the Official Gazette of Canada should be distributed free to the Law Associations of the Counties. And he further promises that the consideration of the government shall be given to the matter of a pecuniary grant to the Libraries in each year.

The profession are much indebted to these gentlemen for the active interest taken in the matter and the good results which followed.

Women as Lawyers.

The Law Society having been applied to by a lady for admission as a student, took refuge from the embarrassing position in which it was placed by declaring that it had no power. Forthwith the applicant hied her to the Legislature, and this august body freed itself from its embarrassment by granting power to the Law Society to admit women as solicitors. The only refuge of the Law Society now is to debar all applicants from entry except graduates of universities—a thing that has been threatening for a time, and which would be a most wholesome rule, apart from the immediate question in hand, in a Province where university education is so easily obtainable. This, however, would only put off the decision of the matter a short time, and sooner or later it has to be taken in hand.

The admission to the Society once gained, the embarrassment of the situation must fall upon the solicitors. There is no way of compelling a solicitor to article clerks to himself, and without office training it would be useless to attempt to qualify as a solicitor.

If every attempt to become articled fails, there is still the Law School. We believe that attendance in the Law School will entitle a student to admission as a solicitor on passing the examination, without service under articles. Here the position is still embarrassing. One can hardly imagine the grave and staid principal lecturing to a bevy of ladies on the inability of married women to contract, the measure of damages in breach of promise cases, the very grave necessity for corroborating their own oaths as to the promise, the mysteries of "the Clitheroe case," and sundry other matters peculiar to themselves and their gentle sex. Equally awkward will it be for the Real Property lecturer to explain the origin and varieties of estates tail, the limits of the rule against perpetuities, the requisites of an estate by the courtesy, *et hoc genus omne.*

The Bar is still closed, however, and that saves for the present the settling of what would be an interminable discussion, "the last word," or rather, in legal phrase, the right of reply.

Bequest to the Law School.

It is not often that a man becomes so enamoured of his profession that he leaves his whole fortune to its use. But we have a recent example. Mr. T. B. P. Stewart, who was but recently called to the Bar, died at an early age, and bequeathed a sum of about $21,000 to the Law Society for the establishment of a library for the Law School. The income alone would suffice to establish and maintain an excellent library, more than sufficient for all the purposes of the school. But there appear to be difficulties in the way. The power of the society to receive the gift is doubted without legislation, and by the provisions of the will two years are given within which to procure the legislation, if required.

The Accountant's Office.

A contributor calls attention to the condition of the accountants' office of the Supreme Court of Judicature, Ontario. It is simply appalling to consider what would be the result, in case of the sudden incapacity of the present Chief Clerk. The case is not one of those in which the policy of one man has inspired such a confidence that we feel that no other like him exists. He has such an intimate acquaintance with the books and accounts that without him there is no explanation of many of the old accounts. The books of the Court should be kept in such a manner that anyone should be able to ascertain at once and without fear of a mistake the position of any estate. As it is, half the præcipes for cheques go in haphazard, and solicitors rely on the correctness of the Chief Clerk, and in very many cases cannot tell whether their cheques are right or not. This is due to nothing but the vicious system of bookkeeping. Good enough when there was but little business to be done, its principal effect now is to load the books with judgments, reports and orders which elbow entries of moneys, and require a perusal of the whole account before one can get at the individual rights of any particular person.

The use of bookkeeping is, by means of mechanical arrangement, to exhibit clearly the state of any account. As our contributor points out, the bookkeeping ought to be done as soon as the account is opened by carrying to each individual account the amount to which that individual is entitled. As it is, the so-called ledgers are nothing but journals containing a series of entries in no kind of order. By adopting the suggestion made each account would be kept separately, and would shew its own tale at a glance. For instance, suppose a case of administration. The whole estate is converted into money, say, $15,000. Instead of crediting this to a purchaser who pays it in or to his solicitor, as it sometimes appears in the book, it should be carried to the credit of the estate. Suppose, a widow and four children A. and B. adults, and C. and D.

infants. The account could be immediately balanced by the following entries:—"To A. (fol.—) share found by report, less amount set apart for widow's income, $2,500." The same for each of the other children. This would leave $5,000 at the credit of the account. A.'s account would be opened with a credit of $2,500 brought from principal account. Debit cheque to A. $2,500, and the account would remain open to receive a credit of $1250 payable at death of widow. The principal account would be credited with interest from time to time, and debited with cheques thereon to the widow. At her death it would be debited with four sums of $1,250 each which would be carried to the credit of the children's accounts.

The infants' accounts would be credited from time to time with interest, and charged with maintenance if any, and closed at majority or previous death. This is a simple case, but there is none so complicated that it could not be so kept. The more complicated the more necessity is there for so keeping the accounts.

A greater grievance than the refusal to receive præcipes for cheques after 20th June, is the absolute refusal of the Court to issue cheques at all in vacation. It is within the memory of the present writer, that if a judicial sale were held at such a date that the purchase money fell due in vacation, the Court refused to receive it but took good care to compel payment of interest at six per cent. until the unfortunate purchaser could pay in the money. That has been remedied by giving power to pay in money in vacation. But so far there is an absolute interdict on payment out in vacation. This is a great hardship. The writer could name one case at least in which a family depends almost solely upon the income received from an investment in Court. One gale of interest falls due in July, but payment is not made until September. The Court would not listen to a debtor who made the excuse of its being vacation for not paying his dues, but they inconsiderately decline to pay out anything during the same period. We cannot see that the mere convenience

of several gentlemen, who are obliged at any rate to attend the office from ten to twelve in vacation, should stand in the way of a simple act of justice.

Judicial Salaries.

After many years, the Minister of Justice has moved the House into Committee of the Whole to consider resolutions respecting judicial salaries. He is expected to bring in a bill based on the resolutions, and it is feared that it will become law. Feared, we say, because a change now means the shelving of the matter for another quarter of a century in all probability, and the proposed changes deserve the name of increase only by courtesy.

At first sight it appears as if the salaries of the Ontario Judges were to be raised $1,000 each but a proviso reduces the increase so that what is given with one open generous hand is furtively filched from by the other. "Provided" the resolution says, "that no Judge shall be paid at any such rate [$100 for expenses in each circuit town] for more than ten courts in any one year, and that for attending each additional court he shall be paid six dollars for each day's absence from his place of residence, together with his actual disbursements for conveyance."

It is well known that our Judges hold more than ten courts each in the year, and so far the proposed measure is one to reduce the amount payable for expenses, and to increase the nominal salaries. In other words, while there is to be an increase in salaries, the Judges will have to contribute to the expense fund out of their increase.

We have taken the pains of tabulating the Government's expenditure for Ontario under the present system, and that under the proposed new system, as follows :—

PRESENT SYSTEM.

EXPENSES.

36 assize towns, 2 sittings a year....=72		
3 assize towns, 1 extra sitting a year= 3		
4 assize towns, 1 sitting a year.....= 4		
Total number of assizes in a year.....79 @ $100 each=		$ 7,900
25 Chancery towns, 2 sittings a year..=50 @ $100 each=		5,000
Total for expenses=		$12,900

SALARIES.

4 Chief Justices @$6,000=$24,000		
10 Judges @..... 5,000= 50,000		74,000
Total.....		$86,900

PROPOSED SYSTEM.

EXPENSES.

79 assizes a year amongst 5 Judges=say 16 assizes a year for each Judge. 5 Judges × 10 assizes @ $100.. ..=	$5,000
5 Judges, 6 additional assizes each; average number of days for an assize for 5 years, 11 days. 66 days × 5 = 330 × $6=	1,980
50 Chancery sittings a year amongst 4 Judges=say, 13 for each Judge; 4 Judges × 10 sittings @ $100.....=	4,000
4 Judges, 3 additional sittings each; average number of days for a sittings for 5 years, 4 days. 12 days × 4 = 48 × $6.....=	288
Disbursements for "conveyance" 129 towns @ an average of $10.....=	1,290
Total for expenses	$12,558

SALARIES.

4 Chief Justices @..... $7,000=$28,000		
10 Judges @ 6,000= 60,000		88,000
Total expenditure, new system		$100,558
Total expenditure, old system		86,900
		$13,658
4 Judges, Court of Appeal, increase.....		4,000
Total increase for 10 Judges of the High Court..		$9,658

or an average increase of $965.80 each.

Thus, we see that while the Judges of the Court of Appeal get an increase of $1,000 each, the High Court Judges' increase of $1,000 each is eaten into by the expense fund. The business of the Courts is steadily increasing, and the number of sittings is consequently increasing, so that the expense account of the Judges will as time goes on increase, while the increase is to be paid out of the paltry $6 *per diem* and disbursements for "conveyance." This is the sum allowed the Registrar of an Election Court while on duty, and is somewhat less than the amount allowed by a respectable mercantile house *ver diem* for each of its travellers.

The actual fact, then, is that the expense account of each Judge which is now fixed at $1,600 *per annum*, or $100 for each assize, is to be cut down by $600 per annum. It is folly to suppose that $6.00 a day will cover his expenses, unless he travels on a cheap plan, goes to the *table d'hote* at hotels and refuses to meet the Bar. Consequently the $1,000 allowed him for ten circuit towns must be drawn on more and more as business increases to supplement the amount allowed for the extra towns. Though there is a slight increase in the salaries, there is a provision in favour of the Government which in future will save them a great amount of expense and substitute a cheap and undesirable method of paying expenses.

The Government certainly will be able to take a little credit to itself for a measure which, to tell the bare truth and only the bare truth, increases judicial salaries, and at the same time will be able to congratulate themselves that by the system adopted they have made provision for a great saving of expense in future. The scheme lacks astuteness, for the most casual observer will see that it takes away from the Judges an allowance which they are entitled to, and substitutes a mode of payment of expenses which does not pay.

The fact has to be faced, that the Judges of Ontario do more work than those of any other Province, that their work is constantly increasing in volume and importance,

that the earnings of the Bar are steadily increasing as business becomes more important, and that men of capacity will decline to sacrifice themselves and their families for a salary that will barely pay the expenses of maintaining the position in which a Judge is placed. The Chief Justices ought to receive at least $10,000, and the others $8,000 or $9,000.

We are not familiar enough with the other Provinces to say how it will affect them; but we notice that extra expenses are allowed the Quebec Judges for extraordinary or additional terms, while the payment of expenses in the other Provinces is left as before. There is, therefore, a genuine increase in the other Provinces, and an illusory one in Ontario.

BOOK REVIEWS.

Commentaries on the Law of Sales and Collateral subjects. By JEREMIAH TRAVIS, LL.B., Harv. '66; recently Judge of the High Court of Justice (*sic*) of the Canadian North West Territories; First Prize Essayist of Harvard University of 1866; author of "A Treatise on Canadian Constitutional Law"; annotator of "Parsons on Partnership," etc. In two volumes. Boston: Little, Brown & Co. London: Sweet & Maxwell. Toronto: The Carswell Co.

Mr. Travis is possessed of the most extraordinary industry. To attempt a work on Sales, the profession being already in possession of authoritative books on the subject, requires also a large degree of courage. Mr. Travis' courage also displays itself in outspoken criticism of cases which he believes to be ill-decided. While this gives one the benefit of the argument we must always remember that we are in the chains of precedents, and the Courts must continue to go wrong until the supreme tribunal, or Parliament itself, alters the law. This book is planned upon a new scheme. A general treatise on Sales exhausts the definitions. Then follow special sales, in which sales with infants, mental disabilities, married women, shipmasters, corporations, fiduciary relations, partners and agency, are all dealt with in their relation to the subject. A section of the work is devoted alone to railroads, and another to the Statute of Frauds. The range of the work is very extensive, and the subject most exhaustively treated.

The Roman Law of Testaments, Codicils and Gifts in the Event of Death (mortis causa donationes). By MOSES A. DROPSIE, translator and editor of Mackeldey's Handbook of the Roman Law. Philadelphia: T. & J. W. Johnson & Co., 1892.

This is a very lucidly arranged compendium of the law of testaments; compiled from different sources. In many cases excerpts from the authorities themselves are inserted in the text, and connected with the commentary on the subject. The chapters on *Donationes mortis causa*, though very short are exceedingly pertinent and present a variety of propositions of great interest to lawyers of the present day.

REVIEW OF EXCHANGES.

Central Law Journal.—9th January, 1891.

Gifts Causa Mortis. By JAMES W. HYDE. This subject is discussed under four questions. 1. Under what circumstances can such a gift be made? 2. What may be the subject matter of such gifts? 3. What is an actual delivery in the sense above used? 4. What are the conditions subsequent which the law annexes to such gifts? English and American cases are cited.

Ibid.—16th January, 1891.

Moral Obligation as a Consideration for Contract, by CURTIS P. SMITH. After citing some English and American authorities, the learned writer says: "It appears, then, in summing up the decisions upon this question, that it may be taken as a settled rule, that a contract the consideration of which is a previous moral obligation, is generally enforceable in courts of law." Two exceptions exist in England. Debts discharged under the Bankruptcy Act cannot be revived; and a promise to pay a debt contracted during infancy is void, except when contracted for necessaries.

Ibid.—30th January, 1891.

The Crime of Rape, by SAMUEL MAXWELL.

Ibid.—13th February, 1891.

Disseisin and Adverse Possession, by A. HOLLINGSWORTH. A number of American cases on the doctrine of adverse possession, now obsolete with us.

Ibid.—20th February, 1891.

Australian System of Land Transfer, by BRADLEY G. SCHLEY. A short description of the system.

Ibid.—6th March, 1891.

What do we Mean by the Term Fixture? by WALTER D. COLES. An examination of the different senses in which the term is used.

Ibid.—13th March, 1891.

Power of Municipal Corporations to take Property for Local Improvements, by D. H. PINGREY. Discussed under the following heads:—1. Rights delegated. 2. Local improvements. 3. Compensation—payment. 4. Due process of law.

Ibid.—27th March, 1891.

Sharing of Profits as a Test of Partnership, by LYNE S. METCALFE, Jr. A number of English and American cases are cited.

Ibid.—3rd April, 1891.

Title of Lands Under Fresh Water Lakes and Ponds, by EDISSERTATOR. Following up the subject, treated by Judge Cooley in 13 Cent. L. J., the learned writer cites authority to show that in the case of inland lakes the ownership of the beds is in the riparian proprietors by reason of their grants. The large inland lakes are to be treated as seas, the title of the riparian owner extending only to the margin of the water when free from disturbing causes.

Ibid.—10th April, 1891.

Territorial Jurisdiction of Criminal Offences, by H. CAMPBELL BLACK. Where an offence is initiated in one jurisdiction and consummated in another the offender must be tried in the jurisdiction where the offence was consummated, though he may be tried for an attempt or a lower grade of the offence in the jurisdiction where it was initiated. When, being in one jurisdiction, he employs an innocent agent in another to commit the offence he is to be tried where the offence was committed. Where he employs a guilty agent he may be tried as a principal, when the offence is a misdemeanor; but when it is a felony the guilty agent is the principal and the instigator an accessory. English and American cases are cited.

Ibid.—17th April, 1891.

Continuity of the Relation of Master and Servant, by J. R. BERRYMAN. The liability of the master to the servant exists while the servant is engaged in his employment. It is said that the servant is so engaged while he remains subject to orders though he may not be actually engaged in labour. A number of cases are cited on the relationship of master and servant where the master carries the servant to and from his work, either free, or for hire deducted from his wages.

Ibid.—24th April, 1891.

Defences to Municipal Aid Bonds, by LYNE S. METCALFE, Jr. There must be statutory power to issue the bonds; and if there is no explicit power given the bonds are absolutely void even in the hands of a *bona fide* holder for value. The power to issue must be strictly followed. But a Municipality may be estopped by recitals, or the subsequent levy of taxes to pay interest on the bonds or the retention of stock in the enterprise aided.

Ibid.—1st May, 1891.

Privilege of Witnesses from giving Criminating Testimony under Clause in Fifth Amendment to Constitution, by J. N. SWARTS. Where a statute provided that no evidence obtained from a party in a judicial proceeding should thereafter be used against him in any criminal proceeding, it was held that he was not privileged to withhold evidence tending to criminate him under the clause of the constitution that no one shall be compelled in any criminal case to be a witness against himself. Comments thereon.

Ibid.—8th May, 1891.

Former Jeopardy, Former Conviction, and Former Acquittal, by D. R. N. Blackburn. Concluded in following number. American cases are cited.

Ibid.—22nd May, 1891.

The Right of an Individual to Abate a Public Nuisance, by Thomas R. Harris. A number of cases are cited illustrative of the rule that there must be special injury to an individual to entitle him to abate a public nuisance.

Ibid.—29th May, 1891.

Defence of Non-corporate Existence to Municipal Aid Bonds, by Lyne S. Metcalfe, Jr. After citing a number of authorities, the learned writer concludes, "In view of the authorities the conclusion is irresistible, that a *de facto* municipal corporation, which has for years exercised corporate powers, is precluded from making the defence of a want of corporate existence in suit on municipal bonds regularly issued by it under valid legislative power, by a *bona fide* purchaser, without notice of any defect and before maturity of such bonds."

Ibid.—5th June, 1891.

The Doctrine of Stare Decisis, by Vernon H. Tichenor. The subject is considered under three heads:—First, as between subordinate and appellate Courts. Second, as between Courts of co-ordinate jurisdiction. Third, as between the Federal and State Courts.

Law Journal.—16th May, 1891.

On Suing Joint Contractors. A number of cases since the Judicature Act are cited.

Ibid.—23rd May, 1891.

Speculating for Differences. In *Salaman* v. *Warner*, it appeared that the plaintiff, in anticipation of stock of a projected company being put in the market for sale, sold in advance. The defendants colluded to have the stock allotted to their nominees, so as to form a corner; and procured the stock to be quoted at the stock exchange. The plaintiff then had to buy at fancy prices to fulfil his contracts. A motion to strike out the statement of claim, on the ground that it showed no cause of action, was successful, though the plaintiff alleged fraud and conspiracy. The collusion was said to make the act no more reprehensible than if done by a single person; and the fraud was not done to injure the plaintiff. The case is adversely criticised.

Impersonal Trusts. Lewin is quoted for the proposition that a trust must be for the benefit of some *person or persons*; that is, there must be a *cestui que trust* who can enforce it. Cases are cited, however, to show that there may be a trust without anyone to ask for enforcement. For instance, a bequest of money to erect a tomb, and provision and direction to keep it in repair for a limited time, so as not to create a perpetuity. Also a bequest to maintain favourite animals.

Ibid.—30th May, 1891.

Slander. Two cases are discussed. In one, *Pittard* v. *Oliver*, L. R. (1891) 1 Q. B. 474, it was held that the criticism of the conduct of their clerk by the Guardians of the Poor, at a meeting did not lose its privileged character by reason of the presence of reporters at the meeting. In the other, *Speight* v. *Gosnay*, 60 L. J. Q. B. 231, where a slander was repeated to the plaintiff, who repeated it to her lover, who in consequence broke off his engagement, it was held that the plaintiff could not maintain an action.

Some Recent Decisions upon the Law of Infants. A collection of cases on contracts, maintenance, custody and procedure.

Ibid.—20th June, 1891.

Regina v. Jackson. Concluded in the following number. This case, known also as the *Clitheroe case*, is treated to some adverse criticism.

Ibid.—11th July, 1891.

Wards of Court. Two cases referred to as to the jurisdiction of the Court over wards with reference to their entering religious communities.

Ibid.—18th July, 1891.

Actions Against Foreign Partnerships. Several modern cases on serving the writ against a foreign partnership having an office within the jurisdiction are considered.

Ibid.—8th August, 1891.

The Court of Appeal on Evere v. Challis. A discussion of the effect of a gift on a devise void for remoteness is discussed.

Ibid.—15th August, 1891.

Two Points on a Solicitor's Retaining Lien. Several cases are cited for the rule that a solicitor's lien does not extend to advances of a general character, but only as to what is due to him as solicitor. When a security is taken for the amount of a bill and the lien is not expressly retained, it is lost.

Ibid.—22nd August, 1891.

Implied Reservation of Easements. The question of creation of an easement by severance of a tenement is discussed, and the learned writer concludes:—"In advising, therefore, on the relative rights of vendors and purchasers the man of law has to consider what was the exact state of things in regard to the whole property when part was put up for sale, bearing in mind that the vendor can impliedly reserve no easements against the purchaser, unless the state of the property, and his obvious intentions with regard to it, raise by implication an agreement to that effect."

Charles Farley Harris,
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THE
CANADIAN LAW TIMES.

JUNE, 1892.

CONSTITUTION OF CANADA: ASPECT OF LEGISLATION AS DETERMINING JURISDICTION.

*Subjects which in one aspect and for one purpose, fall within the jurisdiction of the Provincial Legislatures, may in another aspect and for another purpose, fall within the jurisdiction of the Dominion Parliament.**

IN *Hodge* v. *The Queen* (1883) (*a*) the Judicial Committee say: "The principle which the case of *Russell* v. *The Queen*, 7 App. Cas. 829, 2 Cart. 12, and the case of *The Citizens Insurance Company*, 7 App. Cas. 96, 1 Cart. 265, illustrate is that subjects which in one aspect and for one purpose, fall within section 92 of the B. N. A. Act, may in another aspect and for another purpose, fall within section 91." As stated in Pomeroy on Constitutional Law (*b*), "All experience shews that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each

(*a*) 9 App. Cas. at p. 130, 3 Cart. at p. 160.

(*b*) 1st ed. p. 218, cited by Fournier, J., in *Citizens Insurance Co.* v. *Parsons*, 4 S. C. R. 260, 1 Cart. at p. 306.

*The following article is from advance sheets of a forthcoming work on the Law of the Constitution of Canada, and will be found to have a special bearing upon the question recently discussed in the Local Option Act case in the Court of Appeal, of the power of the Provincial Legislature to impose the necessity of taking out licenses upon wholesale liquor dealers and manufacturers; and, also, upon the question of the Dominion Parliament to impose the necessity of taking out licenses upon liquor dealers or manufacturers.

other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality." In fact this proposition has a close connection with, and may indeed be said to be a corollary of another which will be found treated of in this book, namely, that: "The true nature and character of the legislation in the particular instance under discussion,—its grounds and design and the primary matter dealt with,—its object and scope,—must always be determined, in order to ascertain the class of subject to which it really belongs, and any merely incidental effect it may have on other matters does not alter the character of the law;" and it will be seen from the notes to that proposition, how the leading proposition now under discussion is illustrated by the decision in *Russell* v. *The Queen*.

It is not so obviously illustrated by the judgment in *Citizens Insurance Company* v. *Parsons* (c), but what their Lordships seem to allude to in the passage above quoted from *Hodge* v. *The Queen* is this: In the *Citizens Insurance Company* v. *Parsons* it was held by the Privy Council that the Ontario Act, 39 Vict. c. 24, to secure uniform conditions in policies of fire insurance was *intra vires* of the Provincial Legislature by virtue of its exclusive jurisdiction over property and civil rights, and that the subject of the Act could not properly be held, as was contended, to be included in sub-sec. 2 of sec. 91 of the B. N. A. Act, "the regulation of trade and commerce." The Ontario Act in question simply regulated the contracts of the particular business of fire insurance in the single Province of Ontario, whereas by "regulation of trade and commerce," their Lordships held was meant political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and perhaps general regulations of trade affecting the whole Dominion. Probably, therefore, their Lordships mean that the purport of their judgment in the *Citizens Insurance Company* case was that the proper

(c) 7 App. Cas. 96, 2 Cart. 265.

aspect in which to regard the Act, and its real purpose, was that of an Act to regulate the particular business in a particular Province, and not that of an Act for the general regulation of trade affecting the whole Dominion, etc., and that for this reason it fell within sub-sec. 13 of sec. 92, and not within sub-sec. 2, of sec. 91. And so in *Hodge* v. *The Queen* (1883) (*d*), what their Lordships are pointing out in the passage above cited is that it was a mistake to suppose that because in *Russell* v. *The Queen* (*e*), they had held that a Dominion Act, which viewed in its proper aspect and with reference to its proper purpose was a general Act relating to public order and safety and good morals in the Dominion, fell within the powers conferred upon the Dominion Parliament by sec. 91, to make laws for the peace, order and good government of Canada,—therefore it followed that the whole subject of the liquor traffic was given away to the Dominion Parliament, and consequently taken away from the Provincial Legislature, and that the Liquor License Act of Ontario, R. S. O. 1877, c. 181, which was confined in its operation to municipalities in the Province of Ontario, and entirely local in its character and operation was necessarily *ultra vires*. On the contrary, their Lordships held in *Hodge* v. *The Queen*, that the portions of the Ontario License Act with which they had to deal, in that case came within sub-secs. 8, 15, and 16 of sec. 92, and not within sec. 91.

And so in his most lucid and instructive argument before the Privy Council in this case of *Hodge* v. *The Queen* (*f*), Sir Horace Davey, meeting the objection that to entrust the Provincial Legislature with the power of legislating on licenses would be to interfere with trade and commerce, and that the Ontario Liquor License Act in question was therefore *ultra vires*, observes :—" It may incidentally, of course, affect the particular trade, which is dealt with in the licensing law. But the principal object of the Act

(*d*) 9 App. Cas. 130, 3 Cart. 160.
(*e*) 7 App. Cas. 829, 1 Cart. 12.
(*f*) Dom. Sess. Papers, 1884, Vol. 17, No. 30, p. 98.

is not the interference with trade, nor is it aimed at the interference with trade, but is aimed at the regulation of trade carried on by particular persons, within a particular area, for what may be shortly described as police purposes." At the same time it may well be that as remarked by Wilson, J., in *Reg.* v. *Taylor* (1875) (*g*), quoting from Cooley on Constit. Limitations, 2nd. ed., p. 586: "The line between interference with commerce and regulation of police is said to be a very dim and shadowy one."

In short, in the words of Meredith, C.J., in *Blouin* v. *The Corporation of the City of Quebec* (1880) (*h*), in which case the grounds of the decision of the Privy Council in *Hodge* v. *The Queen* (*i*), were to a great extent, anticipated by the Quebec Superior Court, those people are mistaken who "seem to think it impossible that Parliament and the Provincial Legislatures can for any purpose whatever, or under any circumstances whatever, legislate in relation to the same matter."

And in *Ex parte Ellis* (1878) (*j*), we may find a good example of the leading proposition now under discussion. There a question arose before the Supreme Court of New Brunswick, as to the validity of a Provincial Act (Cons. Stat. N. B. c. 38, secs. 30, 32) which provided for the imprisonment of a person making default in payment of a sum due on a judgment in case (amongst other things) the liability was incurred by obtaining credit under false pretences or by means of any other fraud or by the commission of an act for which he might be proceeded against criminally. It was contended that this was *ultra vires*, because it indirectly attempted to punish a person for criminal offences, and created a tribunal to adjudicate thereon, and that this was legislating on the criminal law. But the majority of the Court held that the Act was a valid Act, because rightly viewed it was an Act for enforc-

(*g*) 36 U. C. R. at p. 211.
(*h*) 7 Q. L. R. at p. 22, 2 Cart. at p. 373.
(*i*) 9 App. Cas. 130, 3 Cart. 160.
(*j*) 1 P. & B. 593, 2 Cart. 527.

ing the payment of judgments, and in the words of Allen, C.J.: "Surely the enforcing the payment of a judgment is a civil right, and the mode of enforcing it a part of the administration of justice and procedure incivil matters in the Province, all of which are expressly within the jurisdiction of the Provincial Legislature. Having, therefore, the right to legislate on these subjects, the 15th sub-sec. of sec. 92, gives them power to enforce any such law by imposing *imprisonment.*" One learned Judge, indeed, Weldon, J., refused to adopt this view of the Act, saying amongst other things: The second sub-sec. of sec. 32, "the person making default had in incurring the debt or liability, in respect of which he has made default, obtained credit under false pretences or by means of any other fraud," is clearly a criminal offence, and comes within the Dominion Act 32-33 Vict. c. 21, secs. 93 and 99, and the Local Legislature cannot, by engrafting such a section on an Act for the recovery of debts, give themselves the power to pass such an enactment: it clearly belongs to the Supreme authority of the Dominion to legislate upon, and they have done so" (*k*).

And in *Pillow* v. *City of Montreal* (1885) (*l*), Cross, J., suggests what would be another application of the legal principle under discussion. There the question was whether an Act of the legislature of Quebec, prohibiting the use of factory chimneys "sending forth smoke in such quantities as to be a nuisance" was *ultra vires*, and the Court of Queen's Bench at Montreal held that it was not for that the offence aimed at though designated a nuisance fell short of the criminal misdemeanour of common nuisance, and the Act concerned police regulation incidental to municipal institutions. But at the place referred to, Cross, J., observes: "Perhaps the question could be met in a broader sense, that is, admitting that the act of permitting or causing a chimney to send forth smoke in such quantity as to be a nuisance amounts to the misde-

(*k*) 1 P. & B. at p. 601, 2 Cart. at p. 537.
(*l*) M. L. R. 1 Q. B. at p. 409.

meanor which is a common nuisance by the criminal law of the land, would the Provincial legislature be prohibited from taking measures not to try whether a common nuisance had been committed for which the offender would be amenable by criminal prosecution, but when a certain state of facts occurred which might or might not amount to such common nuisance would that legislature not be entitled, always acting within their powers, to provide that such penalties would be a consequence of that state of facts? Would such means, adopted for the preservation of the health of the city or any other purpose over which their powers extended, be obnoxious to the objection of invading the attributes of the Dominion Parliament? I would have the impression that it would not, but it is unnecessary to rule this point for the decision of the present case. The offender, in such case, would not be tried for a common nuisance, but for an offence of minor magnitude, which in its nature might or might not be included in the larger offence, which minor offence would not in such case be presumed to amount to a common nuisance. I may, however, remark that the case is fairly put by Judge Torrance in the case of *Ex parte Pillow* (*m*), where he holds that the power of the Dominion Parliament to enact a general law of nuisance as incident to its right to legislate as to its public wrongs, is not incompatible with a right in the Provincial Legislature to authorize a municipal corporation to pass a by-law against nuisances hurtful to public health, as incidental to municipal institutions" (*n*).

But it is in connection with the much discussed decisions of the Privy Council in reference to the liquor traffic, and liquor licenses, that the leading proposition can be most profitably considered and illustrated. In *Molson* v. *Lambe* (1888) (*o*), Gwynne, J., says that the judgments in *Russell* v. *the Queen* (*p*), *Hodge* v. *The Queen* (*q*), *In the matter of*

(*m*) 6 L. N. 209.
(*n*) See S. C. 27 L. C. Jur. 216, 3 Cart. 357.
(*o*) 15 S. C. R. at p. 287.
(*p*) 7 App. Cas. 829, 2 Cart. 12.
(*q*) 9 App. Cas. 117, 3 Cart. 144.

the Dominion License Acts (*r*), and *Sulte* v. *Corporation of Three River* (*s*), all "rest upon the foundation that laws which make or which empower municipal institutions to make, regulations for granting licenses for the sale of intoxicating liquors in taverns, shops, etc., and for the good government of the taverns and shops so licensed, and for the peace and public decency in the municipalities, and for the repression of drunkenness and disorderly and riotous conduct, and imposing penalties for the infraction of such regulations, are laws which, as dealing with subjects of a purely local, municipal, private and domestic character, are *intra vires* of the Provincial Legislature." On the other hand, in the same case (*t*), Ritchie, C.J., referring evidently to the same Privy Council decisions of *Russell* v. *The Queen*, *Hodge* v. *The Queen*, and *In the matter of the Dominion License Acts*, says that "they appear to have established conclusively that the right and power to legislate in relation to the issue of licenses for the sale of intoxicating liquors by wholesale and retail belong to the local legislature"; while Fournier, J. (*u*), says, in like manner, that since the decision of the Privy Council in respect to the Dominion Liquor License Acts: "Il n'est plus permis d'elever de doute sur le pouvoir exclusif des legislatures de passer des lois reglant les licenses pour la vente des boissons enivrantes."

I submit, however, supported by the view expressed by Gwynne, J., that the Privy Council decisions do not justify such a broad statement as that under no circumstances could the Dominion Parliament legislate in respect to the liquor trade through the machinery of licenses. Such a view is, indeed, the very opposite of that which we are informed by the judgment of the Privy Council in *Hodge* v. *The Queen* (1883) (*v*), was raised in the argument of that case, viz., "that the decision of this

(*r*) Cass. Dig. S. C. 548.
(*s*) 11 S. C. R. 25.
(*t*) 15 S. C. R at p. 259.
(*u*) 15 S. C. R. at p. 265.
(*v*) 9 App. Cas. at p. 129, 3 Cart. at p. 158.

Board in *Russell* v. *The Queen* (*w*), was conclusive that the whole subject of the liquor traffic was given to the Dominion Parliament, and consequently taken away from the Provincial Legislature." That this latter contention was unfounded was of course established by the decision of the Privy Council in *Hodge* v. *The Queen*, and we have already noted the distinction which their Lordships draw between the two Acts in question in *Russell* v. *The Queen*, and *Hodge* v. *The Queen* respectively. But, on the other hand, in no way do the Privy Council, in either of these two cases, suggest that the Dominion Parliament can under no circumstances apply a system of licenses in connection with the liquor trade.

In the Matter of the Dominion License Acts, that having been heard on petition of the Governor-General only, no reasons are given for the decision of the Board, but the *verbatim* argument, with constant remarks of their Lordships interspersed, is printed in the Appendix to this book; and a careful perusal of that leads, I think, to the conclusion that in their decision the Board accepted the contention of Mr. Davey, that the Acts in question were *ultra vires* of the Dominion Parliament because they were for the purpose of regulating the liquor traffic through the machinery of local municipal licensing bodies, exercising restricted local jurisdiction, and exercising police functions within those local jurisdictions, and amounted also to a taxation of the inhabitants within the respective Provinces for municipal purposes, because the balance of the license fund under them, after payment of the inspectors' salaries, and the expenses of the commissioners, was to go into the municipal treasury, the regulations and the legislation with reference to wholesale licenses being the same as that with reference to shop and tavern licenses.

Now, if this interpretation of the decision of the Privy Council in the matter of the Dominion License Acts be correct, it certainly conflicts with the dictum of Strong, J., in *Severn* v. *The Queen* (*x*), that, conceding that

(*w*) 7 App. Cas. 829, 2 Cart. 12.
(*x*) 2 S. C. R. at p. 106; 1 Cart. at p. 449.

the Provincial Legislatures have the police power, this could not warrant the imposition of a license tax upon the manufacture or wholesale sale of beer, any more than it would authorize a similar tax upon any other manufacture or commerce by wholesale. Yet that this was indeed the ground on which their Lordships proceeded seems already indicated by the interjectional remarks of members of the Board during the course of the argument, already referred to. Thus (at p. 27), Sir Barnes Peacock says: "In the counties of Chicoutimi, and so on in Quebec, there are powers given which are different from other localities, which tend to show that there are matters of a local nature which must be regulated according to the locality." And (at p. 43) Sir Montague Smith, contrasting the Dominion License Act, 1883 (the principal Act before the Board), with the Canada Temperance Act, decided in *Russell* v. *The Queen* to be *intra vires* of the Dominion Parliament, says: "The difference seems to be that this is a sort of regulating Act rather than a prohibitory Act'; and (at p. 64): "The question is whether this is not, whatever terms it may use in the preamble, really regulating in each province the local traffic." And (at p. 66) Lord Fitzgerald says: "If this Act of 1883 is, as a whole, within the powers of the Dominion Parliament, it supersedes the whole of the Ontario Act which we were dealing with in *Hodge* v. *The Queen*." And (at p. 87) Sir Montague Smith again says: "The question may be,—granted that the Temperance Act might over-ride by prohibiting the traffic altogether,—whether when licenses are to be granted and persons regulated in a police way that is not a local matter"; and (at p. 98): "They think you have regulated minutely in a sort of local way a retail trade."

On the other hand although it is true that in this matter of the Dominion License Acts, the Supreme Court of Canada held the Acts to be *intra vires* as to wholesale and vessel licenses, while *ultra vires* as to retail licenses, while the Privy Council held the Act *ultra vires* in respect to all the licensing provisions, they do not appear in that case, any more than in *Russell* v. *The Queen*, or *Hodge* v. *The Queen*, in my humble

opinion, to justify the very strong statement, that under no conceivable circumstances can the Dominion Parliament legislate in respect to licensing the sale of intoxicating liquors. Indeed, in the course of the argument on this very matter of the Dominion License Acts, Sir Barnes Peacock (at p. 140) put a possible case, where he observes: "You could not say that the Parliament could not create a criminal offence for selling liquors without a license in the same way as they might create a criminal offence by carrying arms without a license, or manufacturing dynamite without a license." And, indeed, as Hagarty, C.J., observes *In re* Local Option Act (1891) (*y*), the Canada Temperance Act, 1878, which the Privy Council held *intra vires* of the Dominion Parliament in *Russell* v. *The Queen* (*z*), itself contemplates the issuing of licenses to brewers and distillers and manufacturers of native wines.

And it is well to recall the emphasis with which the Privy Council insist on the element of uniformity in the Canada Temperance Act, when holding it to be *intra vires* in *Russell* v. *The Queen* (1882) (*a*). They say: "The objects and scope of the legislation are general, viz., to promote temperance by means of a uniform law throughout the Dominion. The manner of bringing the prohibitions and penalties of the Act into force, which Parliament has thought fit to adopt does not alter its general and uniform character. Parliament deals with the subject as one of general concern to the Dominion upon which uniformity of legislation is desirable, and Parliament alone can so deal with it." This seems to afford an important clue to the solution of the problem, if it is a problem, of why their Lordships held the Canada Temperance Act *intra vires*, and the Dominion License Act *ultra vires*, when we remember that under the latter each Board of License Commissioners of the different districts respectively might make their own regulations: Dominion License Act, 1883, secs. 8, 9.

(*y*) 18 App. R. at p. 580.
(*z*) 7 App. Cas. 829, 2 Cart. 12.
(*a*) 7 App. Cas. at p. 841, 2 Cart. p. 25.

Yet, it must be admitted that in *Molson* v. *Lamb* (1887) (*b*), Ritchie, C.J., and Fournier, J., in the Supreme Court of Canada held that the Quebec License Act of 1878, and its amendments, whereby the sale of intoxicating liquors without license obtained from the government was forbidden, and it was provided that whosoever kept, without a license to that effect, an inn, restaurant, steamboat-bar, railway buffet, or liquor shop for the sale by wholesale or retail *in any quantity whatsoever* of intoxicating liquors in any part of the Province municipally organized, should be liable to fine, was *intra vires*; deeming as we have seen that the matter was concluded by the recent decisions of the Privy Council, in which view, indeed, they are at one with Dorion, C.J., in the Court of Queen's Bench, Montreal (*c*), who expresses the view that "after the judgment in the case of *Hodge* v. *The Queen*, and the last decision of the Judicial Committee of the Privy Council, it may be considered as settled that licenses issued to regulate the sale of liquor are not to be considered as being in restraint of trade and commerce, or for the regulation of trade and commerce within the meaning of sub-sec. 2 of sec. 91, B. N. A. Act., but in the nature of police and municipal regulations, coming within the powers of the Legislatures of the different Provinces constituting the Dominion, and that there is no distinction to be made, as regards the authority of the Provincial Legislatures, between wholesale and retail dealers in liquor, nor between the sale made by the manufacturer from that made by the merchant."

In the headnote of the Supreme Court Report, however, an erroneous impression seems to be conveyed, that Ritchie, C.J., and Strong, Fournier, and Henry, JJ., all concurred in holding the Act *intra vires*, but in reading the judgments we see that Strong, Henry, and Taschereau, JJ., did not pass upon the question of the constitutionality of the Act. While though Gwynne, J., held indeed that the Act was *intra vires*, although it did exact and impose wholesale liquor

(*b*) 15 S. C. R. 253.
(*c*) M. L. R. 2 Q. B. at p. 403.

shop licenses, as well as retail liquor shop licenses, for the sole purpose, however, of enabling Provincial Governments to raise a revenue for the purposes of the Province, it is clear that he so held, because he regarded it as a law of the local kind indicated in the passages from his judgment which we have above quoted; at the same time, he held that the Act properly construed, imposed no obligation upon brewers to take out any license to enable them to dispose of the beer manufactured by them; and in this respect differed in its frame as he thought designedly from the Ontario Act under consideration in *Severn* v. *The Queen* (*d*). This case of *Severn* v. *The Queen*, he held, (at p. 287) was not at variance with the recent Privy Council decisions above referred to, but was still a judgment binding upon all Courts in the Dominion, and proceeded wholly upon the construction of sub-sec. 9 of sec. 92 of the B. N. A. Act, the majority of the Court holding "that the obligation imposed by the Ontario Act, 37 Vict. c. 32, upon brewers to take out a Provincial license to enable them to dispose of the beer manufactured by them was in effect an obligation in restraint of the manufacturing by them of the article of their trade, which in virtue of a license from the Dominion Government, issued upon the authority of an Act of the Dominion Parliament, they were authorized to carry on, and that sub-sec. 9 of sec. 92 aforesaid, did not authorize the Provincial Legislatures to impose any such obligations upon brewers." And in the Court below (*e*) Cross, J., also recognizes *Severn* v. *The Queen* as still a binding authority though Ramsay, J., takes a different view. The latter observes (at p. 397-8) that: "It must be remembered that *Severn* v. *The Queen* is not of the highest authority. The present Chief Justice and Mr. Justice Strong dissented, and there was much judicial authority the other way. The Supreme Court is not a final Court of Appeal, and the majority of this Court has since refused to be governed by that decision in the tax cases now before the Privy Council, and unanimously in *Lambe* v. *The Powder Co.*, M. L. R. 1 Q. B.

(*d*) 2 S. C. R., 70 1 Cart. 414.

(*e*) M. L. R. 2 Q. B. 394.

460, also in appeal before the Privy Council. In addition to this the question of liquor licenses has been subject to curious vicissitudes, and the reasoning of the majority of the Supreme Court hardly seems to have prevailed, at least so they have intimated. In a recent case the Privy Council has intimated that the object of the law might determine its constitutionality. Thus in *Russell* v. *The Queen*, 7 App. Cas. 829, 2 Cart. 12, the object of the statute being the general order and good government of Canada, it was declared to be constitutional, while in *Hodge* v. *The Queen*, 9 App. Cas. 117, 3 Cart. 144, the object of the law being municipal institutions in a Province, the statute was likewise declared to be constitutional. We have also admitted this principle in *Sulte* v. *Three Rivers*, 5 L. N. 330, 2 Cart. 280, and that decision was confirmed in the Supreme Court (11 S. C. R. 25). We are not, therefore, I think, disturbing hierarchical authority in disregarding an isolated judgment so compromised as that in *Severn* v. *The Queen*."

In dealing with *Severn* v. *The Queen*, however, it must always be remembered, that the licenses imposed by the Ontario Act in question as expressly stated in sec. 22 of the Act (37 Vict. c. 32), were enacted for the purpose of raising a revenue (*f*) and not as the machinery for carrying out a system of local police regulations in respect to intoxicating liquors, and, therefore, if at all had to be supported under sub-sec. 9 of sec. 92, and the Court held that licenses imposed under that must be *ejusdem generis* with those specifically mentioned in it. It must be added, however, that the Privy Council in *Russell* v. *The Queen* (*g*), do not appear to have regarded "other licenses," in sub-sec. 9 of sec. 92, B. N. A. Act, as to be construed as strictly referring to licenses *ejusdem generis*, because they speak of licenses granted under the authority of the Provincial Legislature for the sale or *carrying* of arms.

(*f*) Per Fournier, J., 2 S. C. R. at p. 132, 1 Cart. at p. 477, and Ritchie, J., 2 S. C. R. at p. 98, 1 Cart. at p. 441.

(*g*) 7 App. Cas. at p. 833, 2 Cart. at p. 21.

To come now to one of the latest decisions on this subject of liquor legislation, *Re Local Option Act* (1891) (*h*), the headnote seems to be misleading, because it conveys the impression that the Court decided that the Provincial Legislature, while it might prohibit sale by retail, could not, under any circumstances, prohibit the sale of intoxicating liquors by wholesale. Whereas, in fact, all that was decided in the case was that on the proper construction of the enactment the constitutionality of which was in question, viz., 53 Vict. c. 56, s. 18, O., as explained by 54 Vict. c. 46, s. 1, the prohibition contemplated, and to pass which municipal councils were empowered to pass by-laws, was a prohibition of sale by retail only, and that this was *intra vires* (*i*). The Court held that the subject fell within sub-sec. 8 of sec. 92, B. N. A. Act, as a portion of the municipal institutions of the Province.

And while referring to this decision, I feel bound to observe, though with great deference, that if the view expressed above of the true purport of the decision of the Privy Council in *Russell* v. *The Queen* is correct, as I humbly submit it is, there is no ground for supposing, as Burton, J.A., does in this case (at p. 587 *seq.*) that if the attention of their Lordships had been drawn in that case to sub-sec. 8 of sec. 92 (municipal institutions) their decision would have been any different. And the learned Judge is certainly mistaken when he states (at p. 588) that in *Hodge* v. *The Queen* (*j*) the Judicial Committee were not considering, nor was their attention drawn to this sub-sec. 8 of sec. 92, B. N. A. Act, because when we look at the judgment in *Hodge* v. *The Queen*, 9 App. Cas. at p. 131, 3 Cart at p. 161, we find that their Lordships especially held that the subjects of legislation in question before them came within sub-sec. 8, 15, and 16 of sec. 92 ; and we find also in the report of the argument of counsel for the Crown that sub-sec. 8 was specially referred to.

(*h*) 18 App. R. 572.

(*i*) Per Hagarty, C.J.O., at p. 582; per Burton, J.A., at p. 592; per Maclennan, J.A., at p. 593.

(*j*) 9 App. Cas. 117, 3 Cart. 144.

Of course if the learned Judge is right in saying (as he does at page 586) that because under "municipal institutions," power to prohibit the sale of intoxicating liquors was included, therefore such power of prohibition must be exclusively in the local legislatures, *cadit quæstio*. But I submit that this is not so. The prohibition of intoxicating liquor may be involved in an uniform Act extending over the whole Dominion, and which, viewed in its proper aspect and with reference to its proper purpose, is a general Act, relating to public order and morals in the Dominion, passed within the powers of the Dominion to make laws for the peace, order and good government of Canada, though it may also be involved as part of a scheme of municipal police regulation embraced in an Act of the local legislation.

In a word the clue and key to the whole matter seems to lie in our leading proposition, that subjects which in one aspect and for one purpose fall within the jurisdiction of the Provincial Legislatures, may in another aspect, and for another purpose fall within the jurisdiction of the Dominion Parliament.

A. H. F. LEFROY.

EDITORIAL REVIEW.

The Accountant's Office.

We print in this number a letter from the Accountant in defence of his office. We need hardly say, though the contrary is assumed, that no blame was intended to be cast either by our contributor or the writer upon any person in connection with the office. We think we may say without any possibility of contradiction, that there is no financial body having transactions of the magnitude and importance of those of the Accountant's office, which carries them on with a staff as small and as poorly paid as the staff of the Accountant's office, and with as faulty a system. It is the fault of no one connected with the office that it is not perfectly satisfactory, but is the fault of an antiquated system, designed when the business was small. Ledger number IV. was opened about twenty years ago. Since that about two ledgers a year on an average have been opened—at first, more slowly, afterwards more frequently. In another twenty years, a still greater proportion will be opened, and the mere question of space for the books will be a serious one.

The system, if system it can be called, is one that no accountant would understand without instructions or [a course of study, and that alone should condemn it. The present chief clerk is the only person who is thoroughly familiar, not with the system only, but with the accounts. We do not think that any one will assert that his place could not be filled. But we do assert that his place could not readily be filled. No accountant, however expert, could tell the state of any important account in the books at a

glance. In some cases days of study would be necessary before he could even draw a cheque. A new accountant would learn the mode of keeping the books in an hour. But he could not, without great labour and consumption of valuable time, acquire that intimate knowledge of the individual accounts which the present chief clerk has, and which is the best safe guard that at present exsists against mistakes. A system that presents a state of circumstances such as that is not one that would commend itself to business men.

It is most gratifying to know that so few mistakes occur as the accountant points out. These are probably the irremediable mistakes. Many other mistakes have occurred which have been remedied, and which would not have occurred if a better system had prevailed; and nothing is said by the accountant of agreement signed by solicitors to protect the accountant against the liability for mistakes in accounts that are absolutely undecipherable. Probably other mistakes occur which are never found out. We believe that we can point to accounts from which solicitors bespeak cheques, without being able to ascertain whether their cheques when received are correct. We do not think that the impression was intended to be conveyed that that is a matter of frequency. It simply points to this, that the longer an account runs the more complicated it becomes, the more difficult to ascertain the individual rights, the greater the liability to mistakes. Why, when bespeaking a cheque for an individual, should we have to go back through the whole account, as one must do in some cases, and spell out the numerous transactions from the beginning in order to ascertain what is due to him? A system of book-keeping that *produces* complication is unsound; the use of book-keeping is to keep accounts clear by mechanical means.

As regards payments in vacation, we must admit that, we were to some extent, perhaps to a great extent, wrong in saying that cheques could not be got in vacation. It is not generally known that they can be bespoken in advance.

But inquiry shows that that rule applies only to cases where the payment is to be made of moneys in court, or certain to be in court, as where interest is credited by the bank, where maintenance is paid for out of money in court, and such like cases. But if money is out on mortgage, and interest is due on the second of July a precipe will not be received for a cheque, because it may not be paid in.

Queen's Counsel.

Under the authority of the Act of the Ontario Legislature, by which constitutional questions may be submitted to the courts for decision, the Attorney-General of Ontario has prepared a case for the decision of the Court of Appeal as to the right to appoint Queen's Counsel, and to establish precedence at the Bar.

The case sets out the report of the late Sir John Macdonald, when Minister of Justice, upon which the opinion of the Law officers of the Crown in England was obtained in 1872. Their opinion was to the effect that the Governor General had power to appoint Queen's Counsel, but that a Lieutenant-Governor could not do so without being authorized by statute, and that the Legislatures of the Provinces had power so to authorize their Lieutenant-Governors. That with respect to precedence in the Courts, the Legislatures of the Provinces had power to decide as between Queen's Counsel appointed by the Governor-General and those appointed by the Lieutenant-Governor. Then follow the various appointments and a narrative of the circumstances accompanying them, the correspondence between the Governments of Canada and Ontario, and finally the despatch of the Lieutenant-Governor of Ontario to the Government of Canada to which we made reference in Vol. X. at p. 58 of this journal.

The case concludes with the following questions :—

1. Whether since the 29th March, 1872 [the date of the Ontario Act authorizing the appointment of Queen's

Counsel] it has been, and is lawful for the Lieutenant-Governor of Ontario, by letters patent, in the name of Her Majesty, under the Great Seal of Ontario,

(*a*) To appoint from among the members of the Bar of Ontario such persons as he deems right to be during pleasure Her Majesty's Counsel for Ontario.

(*b*) To grant to any number of members of the Bar of Ontario a patent or patents of precedence in the Courts of Ontario.

2. Whether appointments of Queen's Counsel and grants of precedence such as are in the case stated to have been made by the Lieutenant-Governor of Ontario since the said date are and would be valid and effectual to confer on the holders thereof the office and precedence thereby purported to be granted.

3. Whether members of the Bar of Ontario from time to time appointed, or to be appointed as aforesaid by the Lieutenant-Governor of Ontario by letters patent in Her Majesty's name under the Great Seal of Ontario to be Her Majesty's Counsel for Ontario, and members of the Bar of Ontario to whom from time to time patents of precedence in the Courts of Ontario have been or may be granted by the Lieutenant-Governor of Ontario as aforesaid in conformity with the limitations of the recited statute of Ontario, have or shall become entitled to such precedence in the Courts of Ontario as have been and may be assigned to them by such letters patent after the several persons or classes referred to in the 3rd, 5th and 7th sections of this said Revised Statute of Ontario.

4. Whether the position as to precedence in the Courts of Ontario of the remaining members of the Bar of Ontario not comprised within the classes referred to in the said 3rd, 5th and 7th sections, and not holding patents issued by the Lieutenant-Governor of Ontario conferring on them the office of Queen's Counsel for Ontario, or granting to them precedence in the Courts of Ontario, is as between them and those holding such patents as aforesaid subsequent to

those holding such patents, and as between themselves in the order of their call to the Bar of Ontario.

5. In case the answer to day of the said questions be in the whole or in part negative, or in case an affirmative answer shall appear to the Court not to be a complete exposition of the matters involved, then what is the true state and condition of the matters involved in such questions ?

It is difficult to see the benefit that will arise to the general public from the presentation of this case, and by how much wiser the government of Ontario will be after the decision than before it. At present both the Queen's Counsel appointed by the Governor-General and those appointed by the Lieutenant-Governor are recognised in all the Courts of Ontario, and no objection to a Provincial Queen's Counsel has been taken in the Supreme Court to his so appearing. So that there is no profit to the Bar to raise the question.

There are other questions arising under the Statutes of Ontario affecting the general public which might with profit be presented for decision. For instance the validity of the Creditors Relief Act, the constitutionality of which has been doubted.

So far, the rule laid down by the Government of Canada, not to intervene in a case where revenue is not affected has been adhered to, and if no one represents the government of Canada on this case the argument will not be as instructive as it otherwise might be.

It would be a curious result if the Court of Appeal after admitting holders of both kinds of patents within their bar for years, were to hold that they had been mistaken.

Tenancy by the Curtesy.

This subject has been advanced a stage, as they say in Parliament. In *Hope* v. *Hope*, 8 Times L. R. 504, a friendly action by a son against his father, the question was presented for decision, whether, when land was acquired by a married woman under the *Married Women's*

Property Act, 1882, and she died intestate without having disposed of it, the land devolved upon the heir-at-law, or was subject to the husband's estate by the curtesy. The decision was in favour of the tenancy by the curtesy. The learned Judge referred to *Cooper* v. *Macdonald*, 7 Ch. D. 288, where Sir George Jessel, M.R., held the same way as to equitable separate estate, and applied the same reasoning to the statutory separate estate created by the Act, saying that "the object of the Legislature was similiar to that which courts of equity entertained, only the Legislature, having a power which the court had not, carried it further by enacting that all the legal rights which an unmarried woman would have with reference to the matter in question should be conferred upon married women.

This is very satisfactory, as far as it goes, but it is much to be regretted that the effect of the 23rd section, the 22nd section of our Act was not passed upon. The opportunity was favourable, and the rights of the parties might have been seriously affected by it. The section is in these words:—"For the purposes of this Act the legal personal representative of any married woman, shall, in respect of her separate estate, have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living." It is impossible, except by an arbitrary interpretation to confine the phrase "separate estate" in this section to personal property. The very next section speaks of "separate *personal* property" and its mode of distribution. The 3rd section declares that a married woman may acquire, etc., "any real or personal property as separate property." And the same expression is used elsewhere in the Act to include both realty and personalty.

If, then, realty is comprehended by the terms of the section in question, the legal personal representative, not the heir-at-law, is to "have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living." What are her rights when living, as to

her separate estate? The essential characteristic of separate estate is that she may acquire, hold and dispose of it free from her husband. If the legal personal representative has the same right, he ousts the husband from his estate, and the heir too for that matter.

Considering the importance of having a construction of this section of the Act, it is to be regretted that it was not passed upon in the case mentioned.

Service under Articles.

It has been pointed out to us, that we may mislead by the assertion in our last number that attendance at the Law School will entitle a student to admission as a solicitor without service under articles. This is erroneous. The rule—No. 158—reads as follows:—"The school term, if duly attended by a student-at-law or articled clerk, shall be allowed as part of the term of attendance in Chambers or service under articles."

A student-at-law or articled clerk may attend the school, and the time of his attendance will be reckoned as part of his service under articles or as student-at-law.

CORRESPONDENCE.

To the Editor of THE CANADIAN LAW TIMES.

The Accountants' Office.

SIR,—In the articles published in the last number of your journal in which the affairs of the Accountants' office are referred to, several inaccuracies occur which I ask leave to correct.

The contributor, who signs himself Anonymous, opens his remarks on this branch of his subject by stating that "it is but a few years since a pocket-book sufficed to contain the account of the Court funds." As a matter of fact it is over twenty-five years since the funds of the Court of Chancery used to be kept on the pocket-book plan. "A few years," of course, is a relative term and to a person of the age of Methusaleh (such as the anonymous contributor may be) a quarter of century may be so designated yet to ordinary mortals such a period is a considerable length of time. Then it is said "concededly there is only one individual—the Chief Clerk—who has a personal knowledge of the position of the various funds of which he is in charge." And it is suggested that his personal knowledge is so essential to the carrying on of the business of the office, that his absence would create a deadlock.

An officer who has been so long in the service and who is so capable and efficient in the discharge of his duty as the Chief Clerk, is, it may be admitted, an important element in the office, but I think it has been proved by experience that no man has yet lived or ever will live whose place cannot be supplied. As a matter of fact the Chief Clerk was last year incapacitated for business for a fortnight, but the business of the office went on and so little impression did his absence create that the writers of the articles referred to, do not appear to have been aware of his absence.

Then it is said that even the Chief Clerk's phenomenal memory is sometimes at fault, "and accounts in some

cases are overpaid or underpaid or paid to persons not entitled at all"—and in another place it is said that "the inadvertent encroachments on the shares of individuals" is a thing not at all uncommon. As these statements may naturally lead to the conclusion that the business of the Accountant's office is so badly conducted that mistakes in the payment out of money are of constant occurrence it may be well to state the true facts of the case in order that it may be seen what foundation there really is for such statements.

Such mistakes do sometimes occur, the officials of the Accountant's office not being gifted with infallibility; but the cases in which they result in any loss have been so rare and inconsiderable considering the large sums dealt with, that I think I am justified in saying that the statements of your anonymous contributor are, to say the least, misleading.

During the past 20 years 61,638 cheques have issued from the office for sums aggregating $26,546,815.05. During that period only seven mistakes have occurred which have resulted in any loss: (1) Which resulted in the loss of a sum of $35.40, was due to an error in the order; (2) a loss of $366.66, due to an error in a report; (3) a loss of $747.49, due to an error of the office; (4) a loss of $898, due to an error in the order and also to some extent to the defective mode of keeping that particular account; (5) a loss of $57, due to a stop order being overlooked; (6) a loss of $200 paid on a false affidavit; (7) a loss of $55.81 overpaid, due to an error of the office. The total loss resulting from these mistakes was $2,360.23 or an average of $118 per annum. Last year alone over $4,000,000 was paid out of Court.

As regards the mode of keeping the accounts, it may be well to remind your readers that they are kept in the mode prescribed by the Consolidated Rules taken from the General Orders in Chancery which were, I believe framed by the present Attorney-General with the advice of competent accountants; and although it must be admitted that the volume of business has immensely increased since the system was first inaugurated, yet in view of the

facts and figures I have given above, notwithstanding the criticisms of the writers in your journal, I think it must be admitted that the system has at all events fairly answered its purpose.

There are many objections to the proposed system of splitting up the accounts. There would be a greater chance of mistakes arising, and it would certainly have the effect of very largely increasing what your anonymous correspondent describes as the already appalling number of ledgers.

There is only one other matter to be referred to—the constantly recurring grievance of the Rule requiring cheques to be præciped by 20th June in each year. For some reason or other solicitors seem always to reserve a mass of business for the very latest moment. Before the Rule was passed, up to the very day before vacation began stacks of præcipes for cheques would be filed, and in many cases they might just as well have been put in three weeks or a month earlier, and among the numerous cheques thus put in would always be found not a few which required more than ordinary consideration. In fact an inordinate proportion of such matters seemed to be reserved for that particular time of the year when there was sure to be the greatest pressure of business. To prevent mistakes and to secure the signing of all cheques with due consideration the Rule was passed, and wherever reasonable ground for doing so is shown it is relaxed.

As regards periodical payments falling due in vacation, a præcipe therefor can be put in on or before the 20th June, and the cheque will be prepared signed and ready for delivery when the payment falls due. The only hardship about this particular matter is that solicitors and suitors entitled to such payments are required to exercise the small amount of forethought necessary for putting in a præcipe in time, which is not after all a "greater grievance" but in fact can hardly be called any grievance at all.

GEO. S. HOLMESTED.

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BOOK REVIEWS.

Bills, Notes and Cheques. The Bills of Exchange Act, 1890, Canada, and the *Amending Act of 1891*, with notes and illustrations from Canadian, English and American decisions, and references to Ancient and Modern French law. By J. J. MACLAREN, Q.C., D.C.L., LL.D., Member of the Bars of Ontario and Quebec; Law Examiner of Victoria University; and Honorary Lecturer on Comparative Jurisprudence in the University of Toronto. Toronto: The Carswell Co. Ltd. 1892.

We have had several publications upon the Bills of Exchange Act, but we must say, without disparagement to other annotators, that this is the most exhaustive and complete work yet published. The introduction consists of a short treatise on negotiable instruments. It is followed by a sketch of former legislation in all the Provinces, and then comes the Act itself with annotations. The notes are critical and illustrative; in some cases we must say a little too critical. For instance, upon the 3rd section—"A Bill of Exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it etc."—the learned commentator says: "First, a Bill of Exchange must be 'unconditional,' yet the next sentence speaks of the 'conditions,' of which there appear to be no less than six." With all deference, we think that the clause is not open to this criticism. It is the order to pay which is to be unconditional. The form of the bill is defined and its contents, and one of the obligations laid upon the drawer is that his command to pay must depend upon no conditions. This, however, is a mere passing criticism

directed to the difficulty of defining without possibility of raising criticism, and does not affect the general excellence of the work. Under each section we find notes of decisions, methodically arranged and illustrations from decided cases. The arrangement is worthy of notice. First come Ontario and Upper Canada cases, then cases from other Provinces, then English and finally American cases. And in addition, the painstaking annotator has added to each case the date of the decision. Besides the ordinary table of cases cited, we find a table of cases over-ruled, questioned or distinguished, a short chapter on negotiable instruments other than bills, notes and cheques, and other cognate matters.

The whole scope of the work indicates great patience and industry and we have no doubt that the book will be found the most useful treatise on the subject.

A Treatise on Power of Sale under Mortgages of Realty, with Appendix of Statutes and Forms. By ALFRED TAYLOUR HUNTER, LL.B. Toronto: The Carswell Co. Ltd. 1892.

This is a well arranged and lucidly written treatise on a very common branch of conveyancing law. It is quite true, as the author says, that it is either passed over or left in a confused state by those who have incidentally dealt with it in larger treatises. The complaint can now no longer be made. The author has collected all the most important and included the most recent cases on the subject, and has in many instances treated them to very intelligent criticism. We have a small fault to find—a great one in some people's eyes—namely, that he cites American cases where English ones would do. As respects conveyancing law there is so much divergence in American principles and statutes from English law that they are not always safe authorities. In addition to the text proper, Mr. Hunter has collected and printed in an appendix The Act respecting Transfer of Property, the Mortgage Act,

the Short Forms of Mortgage Act, parts of the Real Property Limitations Act, the Trustees and Executors Act, and several others having relation to the subject.

We cannot pass over this book without special reference to the forms. We have in another Appendix some very good precedents for power of sale clauses, notice of sale, advertisements, declarations proving service, publication etc., and many other useful forms.

We have one fault to find with the notice of sale, or rather two. It demands payment and provides for giving a certain time within which it is to be made, in default of which the power will be exercised. This is objectionable, in that by the provisions of the Mortgage Act it stays proceedings, even the advertisement, until the time named in the notice has elapsed. There is no necessity for demanding payment. If default has been made a notice of exercising the power is all that is necessary. Secondly the notice of exercising the power is unnecessarily particular, though many good conveyancers use the form. Notwithstanding this, we must congratulate the young author on the production of a very useful and well arranged book, even if it is adorned occasionally with picturesque expressions not usually attempted by the purveyors of dry subjects.



THE

CANADIAN LAW TIMES.

JULY, 1892.

THE CONSTITUTION OF CANADA.

IV.

WE take up again this subject, which was dealt with last in our last volume, at p. 233.

Regulation of Trade and Commerce.—We return to this head of jurisdiction merely to correct an error into which we fell with regard to *Smith* v. *Merchants' Bank.* In dealing with that case we overlooked what is a very evident and important fact, namely, that the instrument in question in that case was not a bill of lading but a warehouse receipt. The latter is essentially of a local character, the *situs* of the warehouse determining the jurisdiction to which it is subject, while the former is essentially of a transitory, interprovincial or international character.

In *Hately* v. *The Merchants' Despatch Co.* (*a*) the validity of the Ontario Act respecting bills of lading was challenged but not decided upon.

Bankruptcy and Insolvency, continued.—We left this subject at p. 248 of volume XI., and now resume it.

By one of the sections of the late Insolvent Act it was provided that purchasing goods by one knowing or believing himself to be unable to meet his engagements, and

(*a*) 2 Ont. R. 385.

concealing the fact from the person thereby becoming his creditor, and not paying for the goods, was fraudulent; and that the debtor should be liable to a term of imprisonment for a term not exceeding two years unless the debt and costs were sooner paid. The validity of this enactment came in question in *Peak* v. *Shields* (*b*). In the Common Pleas, Galt and Osler, JJ., were of opinion that the enactment was valid as coming fairly within the scope of an insolvent law, while Wilson, C.J., held that as the goods were in this case purchased in England, and the Act had only a local operation, the plaintiff could not succeed. In the Court of Appeal, Spragge, C.J.O., and Morrison, J.A., were of opinion that the enactment was valid. Burton, J.A., thought it too clear for argument that the Parliament was confined to the enactment of such provisions as would secure the realization and equal distribution of the insolvent's estate, with power to punish fraudulent conduct on the part of the insolvent by the withholding of his discharge; but that this enactment was "in point of fact providing an additional remedy to the creditor so defrauded for the recovery of his debt," and so came within the exclusive power of the Provincial Legislature. Patterson, J.A., without attempting to decide the point (for other reasons), thought the existence of a similar provision in the Act of 1864, which was in force when the Union took place, a strong, if not an unanswerable, reason for holding that the re-enactment 'after the Union was *intra vires*. In the Supreme Court (*c*), Sir Wm. Ritchie, C.J., and Fournier, J., thought the enactment valid. The other Judges gave judgment on other grounds. The majority of the Judges therefore were in favour of the constitutionality of the enactment.

The Dominion Winding-up Act has been held to apply to Provincial companies which become insolvent (*d*), but

(*b*) 31 C. P. 112; 6 App. R. 639.

(*c*) 8 S. C. R. 579.

(*d*) *Re Clarke and Union Fire Ins. Co.*, 10 Ont. R. 489; 14 Ont. R. 618; 16 App. R. 161; 17 S. C. R. 265. See also *Re Iron Clay Brick Man. Co.*, 10 Ont. R. 113.

not to foreign companies, which on principle are to be wound up in the forum of the domicile (*e*).

Fisheries.—The Dominion Parliament is given jurisdiction over "Sea coast and inland fisheries." This subject received exhaustive treatment in *Regina* v. *Robertson* (*f*). The Dominion Government, acting under an Act of the Parliament of Canada, leased to Mr. Robertson a right of fishing in a non-navigable part of the River Miramichi, in New Brunswick. The Province had previously granted a large tract of land to a company, and to settlers on both sides of the river, but the fact of the grant had no effect upon the judgment of the Supreme Court. The right of fishing being a right of property, the grant must come from the Province in such a case. The right of the Dominion Parliament, it was held, extended only to the protection and regulation of the fisheries, not to the granting of, or interfering with, the right or property, except for the purposes of regulation and protection. The grounds of the decision and the division of the jurisdiction between the Legislatures will appear from the following citations. The right of passage not being inconsistent with an exclusive right of fishing, and the latter being a right of property (*g*), as shown by the Chief Justice, he proceeds to say, "I am of opinion that the legislation in regard to inland and sea fisheries contemplated by the B. N. A. Act was not in reference to 'property and civil rights'—that is to say, not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a material and general concern, and important to the public, such as the forbidding fish to be taken at improper seasons, in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries. . . I cannot

(*e*) *Merchants' Bank of Halifax* v. *Gillespie*, 10 S. C. R. 312.

(*f*) 6 S. C. R. 52; 2 Cart. 65.

(*g*) See a very interesting case on several fisheries in the River Thames: *Smith* v. *Andrews*, L. R. (1891) 2 Ch. 678.

discover the slightest trace of an intention on the part of the Imperial Parliament to convey to the Dominion Government any property in the beds of the streams or in the fisheries incident to the ownership thereof, whether belonging to the Provinces or individuals, or to confer on the Dominion Parliament the right to appropriate or dispose of them and receive therefor large rentals which most unequivocally proceed from property, or from the incidents of property in or to which the Dominion has no shadow of a claim; but, on the contrary, I find all the property it was intended to vest in the Dominion specifically set forth. . . Therefore, while the Local Legislatures have no right to pass any laws interfering with the regulation and protection of the fisheries, as they might have passed before Confederation, they, in my opinion, clearly have a right to pass any laws affecting the property in these fisheries, or the transfer or transmission of such property under the power conferred on them to deal with property and civil rights in the Province, inasmuch as such laws need have no connection or interference with the right of the Dominion Parliament to deal with the regulation and protection of the fisheries, a matter wholly separate and distinct from the property in the fisheries. By which means the general jurisdiction over the fisheries is secured to the Parliament of the Dominion, whereby they are enabled to pass all laws necessary for their preservation and protection, this being the only matter of general public interest in which the whole Dominion is interested in connection with river fisheries in fresh water, non-tidal rivers or streams, such as that now being considered, while at the same time exclusive jurisdiction over property and civil rights in such fisheries is preserved to the Provincial Legislatures, thus satisfactorily, to my mind, reconciling the power of both Legislatures without infringing on either."

To the same effect are the other judgments of the Court. This produces to some extent a conflict of rights. While the Provinces can grant the right of fishing in private rivers, they cannot regulate the exercise of the right.

This is of itself a contradiction in terms. The power to grant a right implies a power to grant a qualified right; such as the privilege or right of enjoying the property granted at certain times only, or for a limited time only. For instance, the grant might be of a right to fish only in certain months of the year. The grant would be valid; but it would imply the right of protection or preservation which has been denied to the Provincial Legislature. Fishing might be prohibited by the Dominion Parliament during the same months, when the grant, though not void, would be ineffective. So, if the Dominion Parliament prohibited fishing for a period of years, a grant of a fishing right by the Province during the same time would be valid but ineffective. So, by way of regulating fishing, the Dominion Parliament might forever interdict the use of any instrument except a rod and line, while this might possibly be the only useless and unprofitable mode of enjoying the right. Similarly, the Province might grant the right of fishing with rod and line only, while the Dominion might interdict the use of rod and line only, by way of regulating the fishing. Again, it is well known that in certain rivers the fishing is later or earlier than in others, this being due to local causes entirely; and it is thus impossible to make a uniform law which will bear evenly on all.

The question of the division of jurisdiction has not been finally settled between the Parliament of Canada and the Provincial Legislatures, notwithstanding this decision. And a collection of the various papers on the subject was, in 1891, made and caused to be printed by the Honourable Mr. Tupper, Minister of Marine and Fisheries. It sets forth the positions taken by the Dominion and the several Provincial Governments, the correspondence between them, and the various Acts of the Provinces, and suggests the advisability of submitting a case for the final decision of the Judicial Committee of the Privy Council.

The claim made by the Province of Ontario is, shortly, this: That the Provincial jurisdiction extends along the

lake and river coasts on our frontiers (*h*). The Dominion Government expresses itself as willing "to relinquish its control and be relieved of the cost of the protection of" the rivers, streams, and inland lakes of Ontario (*i*). Meanwhile, under the Ontario Fisheries Act, 1885, the Provincial Government passed certain regulations as to granting leases and regulating the fishing in the Ontario waters, to some of which no objection was made, as they seem clearly to fall within the rights of property which the Provinces seem to possess. But such regulations as the following were said by the Dominion Government to be objectionable, namely:—No person shall, except under authority of a lease, etc., catch fish in an inland lake, etc., adjoining the *ungranted* lands of the Province.

No person shall, without lawful authority, catch fish during their spawning time. It shall not be lawful to use explosives, etc., for killing fish.

Fishing by torch-light is prohibited.

No person shall catch, kill, etc., or have in possession any fish at times when the taking of fish is prohibited.

It shall not be lawful to use traps, etc., for catching fish, or whereby the free passage of fish up and down the streams may be obstructed.

The catching of fish when passing any obstacle, etc., is forbidden.

Provision against polluting the waters.

The provision as to close seasons.

And they were said to be objectionable because not limited to fisheries within the control of the Province. It is further pointed out, however, that they might be held to apply only to fisheries within Provincial control—and no doubt that would be so. But if *Regina* v. *Robertson* is correctly decided, these regulations would probably be bad, as not being limited to the granting of the right to fish or

(*h*) Letter of Hon. A. S. Hardy to Dominion Government, 6th July, 1886.

(*i*) Letter 22nd July, 1886, Dep. Min. Fisheries to Hon. A. S. Hardy.

property in the fisheries, but extending to the mode of user. There are other regulations of doubtful validity for the same reason, namely :—The wasteful destruction of fish involves the cancellation of the license. The prohibition of the right to use nets where fishing by rod only is permitted. The property or right granted, however, might well be a right to fish by rod only. It has yet to be determined whether that would be a regulation or a species of property.

In a communication of 9th July, 1887, by the Deputy-Minister of Fisheries to the Commissioner of Crown Lands, the relative positions of the Governments was put as follows :—In respect to title to, or property in the fisheries of the Province, it is to be observed—

"(*a*) That the title to the fisheries which are situate in the great lakes and other public navigable waters in the Province is vested in the Crown, in the right of Canada.

(*b*) That the title to any fishery which is situate in private or non-navigable waters passing through ungranted lands is vested in the Crown, in the right of the Province and the riparian proprietor.

(*c*) That the title to any fishery which is situate in private and non-navigable waters, passing through granted lands is vested in the riparian proprietors.

The Dominion thus claims a property in or title to fisheries in the great lakes and navigable waters. Because a river may be navigable, however, it does not follow that there cannot be a private right of fishing, as will be seen by the case of *Smith* v. *Andrews* (*j*) above referred to. In that case a public right of fishing in the Thames above tide-water was claimed by prescription, as against a riparian owner. North, J., said, "The idea is sometimes entertained that the right to pass along a public navigable river carries with it the right to fish in it, but so far as regards non-tidal rivers this is not so. No lawyer could take that view. Persons using a navigable highway no more acquire thereby a right to fish there than persons passing along a

(*j*) L. R. (1891) 2 Ch. 678.

public highway on land acquire a right to shoot upon it. Some few passages may be found in the books in which Judges are reported to have said that subjects have a right to fish in navigable rivers, just as in the sea; but on investigation it always will be found that they are referring to navigable rivers where the tide ebbs and flows, and nothing else." His Lordship quotes from an Irish case the words of Lord O'Hagan, who says, "Upon a full consideration of all the cases, it will, I think, appear that no river has been even held navigable, so as to vest in the Crown its bed and soil, and in the public the right of fishing, merely because it has been used as a general highway for the purpose of navigation, and that, beyond the point to which the sea ebbs and flows, even in a river used for public purposes, the soil is *prima facie* in the riparian owners, and the right of fishing private." And after citing other authorites, he says, "To prevent misconception, I would add that, when the bed or soil is said to belong to the riparian owner, the reference is to the origin of the title only. The right to the bed of the stream is not inseparably bound up forever with the right to the bank. An owner of both may retain one and part with the other; as, in the present case—the bed of and fishing in the river having become a separate property, to which the title is separately traced."

It thus appears that a private right of fishing may exist in navigable waters; and consequently the title of the Dominion to the fisheries in navigable waters does not, if depending on that ground, seem to be well laid.

The further claim, however, is made in the communication referred to, that all fisheries, whether the title thereto is vested in the Crown in the right of Canada, or in the right of the Province, or in a private person, are equally subject to such laws as the Parliament of Canada enacts in respect thereof. That must be taken to mean with regard to their regulation. This claim is repeated in a dispatch of 6th November, 1889, from the Acting Minister of Fisheries to the Assistant Commissioner of Crown Lands.

With regard to Quebec, by a resolution of the Legislature, it was claimed the right to the fish in the streams of the Province was in the Province, as laid down in *Regina* v. *Robertson*.

No conflict has arisen in the other Provinces.

It will be seen, therefore, that the question is one which presents unusual difficulties, upon which there may well be differences of opinion which nothing can settle but the decision of a final Court of Appeal.

In *Mowat* v. *McFee* (*k*), the jurisdiction of the Dominion Parliament to regulate sea coast fisheries was not disputed. By the *Fisheries Act* (*l*), drifting for salmon was declared to be illegal; and it was held to be an offence against the Act to drift for salmon in the Bay of Chaleurs, which lies between Quebec and New Brunswick, although the drifting took place more than three miles from the shore of either Province, the bay being Canadian waters.

Banking, Incorporation of Banks, etc.—In *Smith* v. *Merchants' Bank* (*m*), three of the Judges of the Supreme Court of Canada held to be *intra vires* of the Parliament of Canada those sections of the Bank Act which enabled a bank to acquire and hold warehouse receipts, claim a lien on the goods, and sell them to satisfy the lien, and providing conditions necessary thereto. In *Tennant* v. *The Union Bank* (*n*), it is stated by Burton, J.A., that the question of *ultra vires* as to these enactments was formally raised but not argued on account of the expression of opinion in *Smith* v. *Merchants' Bank*. The writer is informed that this case will be taken to the Judicial Committee of the Privy Council, where the point will most probably be settled.

In *Regina* v. *Co. of Wellington* (*o*), it was held by the Chief Justice of Ontario and Osler, J.A., that an Act relating to the property of an insolvent bank was valid as dealing with "Banking and Incorporation of Banks" as

(*k*) 5 S. C. R. 66.
(*l*) 31 Vict. c. 60, s. 7, s-s. 8.
(*m*) 8 S. C. R. 512.
(*n*) 18 App. R. at p. 30.
(*o*) 17 App. R. 421.

well as with "Bankruptcy and Insolvency"; the Court below having held it to be within the latter head of jurisdiction only. In the Supreme Court (*p*), Ritchie, C.J., was alone in holding that the Act might be referred for its validity to the jurisdiction to deal with banking as well as the jurisdiction in bankruptcy and insolvency.

Interest.—In *Schultz* v. *City of Winnipeg* (*q*), it was held, Killam, J., dissenting, that a statute of the Legislature of Manitoba to provide for adding to overdue taxes a percentage per month was *ultra vires*, because it was in reality a provision for adding interest, a topic with which the Parliament of Canada alone could deal. This case has, however, been reversed in the Supreme Court of Canada.

Indians and lands reserved for the Indians.—The title to and extent of jurisdiction over Indian lands was very clearly set out in *Regina* v. *St. Catharines Milling Co.* (*r*). By the Proclamation of 1763 possession was granted to the Indians of such parts of the territories of North America as were reserved for their hunting grounds, and it was further declared that purchases from the Indians should not be made by any private person, but on behalf of the Crown only by the Governor of the Colony in which the lands lay. Since that date, though the administrative authority in these possessions has from time to time been changed, there has been no change in the character of the interest which the Indians had in the lands. By a treaty made with the Indians in 1873, certain lands in Ontario were surrendered by the Indians to the Government of the Dominion for the Crown, subject to certain privileges of hunting and fishing. The Province of Ontario claimed the lands so divested of their burden, and the Courts unanimously sustained the claim. The position is so clearly put by Lord Watson, in delivering the judgment of

(*p*) 19 S. C. R. 510, *sub nom. Quirt* v. *Reginam.*

(*q*) 9 Occ. N. 73, 353; 6 Man. L. R. 35, 269.

(*r*) 10 Ont. R. 196; 13 App. R. 14; 13 S. C. R. 577; 14 App. Cas. 46.

the Judicial Committee, that a few quotations will best explain it. "The Crown," he said, "has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the Union land vested in the Crown, subject to an interest other than that of the Province in the same within the meaning of section 109; and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than these already noticed. . . . The fact that the power of legislating for Indians and for lands which are reserved to their use has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian titles." It will thus be seen that the lands reserved for Indians in the organized Provinces are the legal property of the Crown, the beneficial use being the property of the Province in which the lands lie, but its enjoyment is deferred until the burden imposed by the reservation for the Indians is removed or extinguished. It was further held that the natural import of the treaty was not to operate as a conveyance to the Dominion Government, which in fact purported to be a transaction between the Crown and the Indians, and that the Commissioners who represented Her Majesty had no power to take away from the Province the land which became its property at the time of the Union by the Act of 1867.

It is left undecided whether a Province could of its own motion and power extinguish the Indian rights. But apparently it could not. To permit that would be to permit an interference with the direct power of legislation granted to the Dominion Parliament. The power to remove the Indians must lie with that body. And though the Dominion alone could remove them, as it could not

acquire property in the land thereby, the Provincial authorities must necessarily be a party to any such treaty in the future, if it is designed to cast the burden of discharging the expense upon it. In the case in question the Province was directed to relieve the Crown and the Dominion of all obligations involving the payment of money which were undertaken by Her Majesty.

How far the Province could act in opening the lands up for settlement was also left undecided. The Indians, having assured to them hunting and fishing rights, would still be subject in this territory to Dominion legislation and executive control, which would be to some extent interfered with by grants to private persons.

EDITORIAL REVIEW.

The Accountant's Office.

The Accountant writes another letter in defence of his office in this number. We must repeat that no attack was intended, or indeed made, upon the administration of the office. It is most orderly and methodical, and the work pretty free from mistakes. But an attack was intended to be made, and was made, upon an antiquated, clumsy method of keeping the books, which no one can successfully contend is adapted to affairs of the magnitude of those which are dealt with in that office. The fact is, as the accountant shows, that documents are occasionally signed by solicitors in order to protect the accountant. It is a lamentable thing that the system admits of complications. Where it becomes necessary to refer to a master to ascertain and state the various rights of parties, it involves the proposition that the master can elucidate the matter, and by a schedule to his report, set out clearly the different parties entitled, with the respective sums to which they are entitled, opposite to their names. Such a schedule is always appended to a report in the administration of an estate, and the rights of the parties can be ascertained at a glance. If there are annual charges to be paid, and infants who require maintenance to be paid from the funds in Court, the result is that the account becomes so complicated after a while that the rights of the parties, and the amounts due to them cannot be ascertained without reading the history of the whole proceedings from the beginning; and in process of time, as we see, in some cases, to require a reference or agreement between solicitors, before the account can be unravelled. It does not mend the matter to say that an agreement to abide by an interpretation given by the accountant is not a compromise. Nor does it make it any better to say that it is

on account of various proceedings that the rights have become complicated. Where one single account contains the various transactions, entered without regard to any system except the order in which they occur, year after year, complications must necessarily arise. The use of book-keeping is to extract from various transactions the amounts due to and from persons, and to arrange them mechanically in order, so as to present to the eye at once the relative positions. Now, if at each stage at which rights are ascertained the books were charged with *the result*, so as to show that A. had at his credit such and such an amount, and that he was charged with such and such an amount, and so with others, complications could not arise, even upon the changes made in the way the accountant points out. In other words, the interpretation should be spread on the books or scheduled at various intervals. As it is, a glance at the books will show nothing. If a solicitor is newly employed by a client to procure a cheque on an old account, he cannot ascertain whether there is anything at his client's credit, without reading the judgments, orders and reports from the beginning. Having mastered these, he cannot tell whether his client is entitled to anything without going over the whole accounts, and making computations, unless it happens that his client was entitled to a single sum, and that sum has not been drawn. The interpretation of the various judgments, orders and reports is left for generation after generation to ascertain from perusal of the whole accounts. It is a bad system, and should be amended. Nothing better is desired than that a better system should be adopted.

We must repeat that the prolonged absence of the chief clerk would make this abundantly clear. It has been stated that an absence of two weeks did not make any difference in the administration of the office. But on enquiry we are told that during that fortnight many precipes for cheques were laid on one side, being endorsed "Wait till Mr. M. returns." And we are also informed that he himself, during that period, returned to the office as wrong

cheques sent to him, which were all signed but awaited his initials.

We hope the accountant will not retain the idea that the administration of the affairs of his office is attacked. It is the system. The unanimous voice of solicitors is that the old accounts are, in many cases, almost unintelligible. This evidence is overwhelming. It cannot be disputed. Mistakes are few; but all assert this to be due largely to the peculiar knowledge of the chief clerk.

It is well known that some time ago he devised a system to supplant the present one, that the accountant also suggested a new system, and that nothing further was done.

The Land Titles Office.

The report of the Master of Titles for 1891 has been issued, showing a decline in the business of his office due to the stagnation in property after the recent period of speculation. Except during the first year of the existence of the Land Titles Office the year 1891 shows the smallest amount of property brought under the Act in any year. In 1889 the largest amount was passed—value of vacant land being $827,074; land built upon, $175,105; farming land $11,500; total, $1,013,679. In 1888 there was a great decline, the total value of land brought under the Act being $654,120. There was a rise in 1889 and 1890, but in 1891, it declined suddenly to vacant land, $246,388; land built upon, (still rising) $164,200; farming land, $4,000; total, $414,588.

Though the Act requires values to be given for the purpose of the guarantee fund, it is probably not a very good means of ascertaining the transactions of the Land Office. Vacant land which was valued at $827,074 in 1887 would not be valued at that figure now. Inflated prices were put upon lands while speculation was rife, but they have declined to such an extent that it is doubtful whether the figures of 1891 show the true proportion between the extent of the transactions in that year, and those of 1889. This, however, is certain, and is by no

means new, that the system was largely used as a ready aid to speculation.

The amount of farming land brought under the Act is very small. There is no indication of where it lies, but it is probable that a great part of it lies within the speculative area. In 1887, it amounted in value to $11,500; in 1888, to $25,000; in 1889, only $400; 1890, $6,150; 1891, $4,000. As a rule titles to farm lands are not very complicated, and the expense of putting them under the Act is a deterrent.

In the table of first registrations at Toronto during 1891, the costs of the Land Titles Office alone are given; and the casual reader would at once obtain the idea that the expense of putting land under the Act was small. It takes no notice whatever of the tax for the guarantee fund, which is a first expense, and should be shown. There were twenty-eight registrations of land, valued at $414,588. Costs paid land in the office, $649.35, or an average of $23.20 each; tax for guarantee fund, $1,036.47; solicitors' costs at $100 each application, $2,800; total $4,485.82 for putting the property under the Act.

The system is not yet self-supporting, and if there is a further decline in the amount of property put under the Act it will become burdensome. The receipts of the office for 1891 were $6,470; the expenses, $7,562.51; loss, $1,092.51. In 1890 (printed 1891, but we presume it is 1890, as a comparison is being made between that year and 1891) the receipts were $9,062, and the expenses, $7,816.55. It is a matter of surprise that the receipts for 1890 were not larger. In that year property of the value of $922,680 was put under the Act, being more than double the value of that put under the Act in 1891; while the receipts of the office for 1890 are not in excess of the receipts of 1891 by a third of the amount.

The Master of Titles complains of the conveyancing done. No certificate being taken out in many cases, the parcel is not identified for the purpose of a transfer, and if subdivided the descriptions are often inaccurate.

The Naming of Cases.

When a case of importance goes through several appeals and becomes well known, it is of no little importance that its name should be retained. The practice of our Supreme Court, however, is to put the name of the appellant first whether he is plaintiff or not. By that means, unless the plaintiff appeals, or unless there are but two parties, the case becomes difficult to find sometimes, although one may well know that the Supreme Court has passed upon it. For instance, the case of *The Queen* v. *The County of Wellington* is a well-known case on a matter affecting a large quantity of property. In the Supreme Court it appears as *Quirt* v. *The Queen*, as the defendant Quirt was the appellant. It is entirely unrecognizable by name with its new title. And there are many others in the same plight.

The Judges of the Supreme Court would confer a favour and a benefit on the profession if they passed a rule to preserve the original title of the case, and require the appellant and respondent to be distinguished by these additions in the style of cause as is done in the Court of Appeal for Ontario.

CORRESPONDENCE.

The Accountant's Office.

To the Editor of THE CANADIAN LAW TIMES.

SIR:—In the letter of your anonymous contributor the following statement occurs, which I inadvertently omitted to notice in my letter, which appeared in your last issue, viz.: "Many practitioners will recall occasions where tedious investigations have been necessary, and where sometimes the Gordian knot has had to be cut at last by a compromise as to the ownership of moneys in Court—a compromise signed by the solicitors for the parties to protect the accountant's office."

This statement, because unnoticed, you assume to be accurate, for you say in your comments on my letter: "Nothing is said by the accountant of agreements signed by solicitors to protect the accountant against the liability for mistakes in accounts that are absolutely undecipherable."

As there is evidently a very great misapprehension of the facts in reference to this matter in the minds of both yourself and your correspondent, I trust you will permit me to say:—(1) There are in the ledgers of the Court about 8,750 different suitors' accounts.

(2) During the last 20 years in which I have been directly or indirectly connected with the Accountant's Department, in no instance, to my knowledge, has any "compromise" ever been required to be signed by solicitors to protect the accountant's office; nor in any case has any agreement ever been required to be signed by solicitors to protect the accountant against the liability for mistakes in accounts that were absolutely undecipherable.

(3) And in no case has any account in the books ever been absolutely or relatively or in any other conceivable way "undecipherable."

What has occurred in, at the very utmost, not more than half-a-dozen instances (the chief clerk says three or four), and which is the only possible ground for the statements above referred to, is this:—Owing to the multiplicity of judgments, orders and reports extending over a long series of years, made in, at the most, half-a-dozen of the 8,750 causes, it has become very difficult to gather from them what their precise effect was upon the moneys in Court. Under these circumstances two courses were open, (*a*) To refuse to pay out any money until the relative rights of parties had been made plain by a further adjudication by the Court, which would probably involve a reference to a Master—or (*b*) For the officials of the Accountant's Department to undertake to solve the question. The latter course being, of course, the least expensive. In such cases, in the few instances I have referred to, it has been thought advisable to require the solicitors to assent to the interpretation which the Accountant gave to the various judgments, orders and reports affecting the moneys in Court—as being a ready way out of the difficulty—not in any sense by way of compromise, but as being the correct legal result of the documents as affecting the rights of the parties.

Difficulties of this kind have arisen, not from any defect in the keeping of the books, as suggested, but from the complication of the rights of the parties as disclosed in the judgments, orders and reports, which no system of book-keeping which the wit of man could devise could make simple.

GEO. S. HOLMESTED.

BOOK REVIEWS.

The Insurance Corporations Act, 1892, with practical notes and appendices. By WILLIAM HOWARD HUNTER, B.A., Barrister-at-law, with an introductory chapter by J. HOWARD HUNTER, M.A., Barrister-at-law, Inspector of Insurance and Registrar of Friendly Societies for the Province of Ontario. Toronto: The Carswell Co. Ltd., 1892.

This work contains the Act of 1892, with commentaries and annotations. The Insurance law of Ontario being in the comprehensive form in which this Act puts it, the opportunity was favourable for the issue of the present work.

The introduction gives a useful though short history of the development of life and accident insurance, and a *resumé* of the constitutional cases bearing upon the subject. The writer of the Introduction does not make it quite clear whether he considers the Dominion Winding-Up Act as inapplicable to insolvent Provincial Insurance Companies. But his words would lead one to that belief. The decision of the Supreme Court has set the question at rest, for the present, at any rate; and it seems clear on principle that a corporation when insolvent, should be subject to the jurisdiction of the Parliament having jurisdiction over Bankruptcy and Insolvency, although its political existence was due to, and its civil rights depended while solvent on the Provincial laws. The voluntary winding up of a Provincial company, however, undoubtedly takes place according to Provincial laws.

The commentaries and annotations on the Act itself, are very full and useful; and the Act respecting insurance for the benefit of wives and children, with annotations therein, is contained in an appendix. A very comprehensive and useful table of the corporations which may do business in Ontario is given, showing at a glance what is required to legalize the business of a company. In appendices are contained various forms of contracts of insurance, and departmental forms for registry, etc.

An Epitome of Real Property Law for the use of Students, by W. H. HASTINGS KELKE, M.A., of Lincoln's Inn, Barrister-at-law; author of "A Digest of the Law of Practice under the Rules of Court, 1875-1879," etc. London: Sweet and Maxwell, Ltd., 1892.

This little hand-book does not profess to be a treatise on Real Property Law, but a comprehensive digest of principles to be filled in as to details by wider reading. As a guide to more extensive reading, it will prove very useful to the student.

REVIEW OF EXCHANGES.

Central Law Journal.—12th June, 1891.

Effect of other or Double Insurance upon Mortgagee's Insurance, by W. W. THORNTON. As a general rule both the mortgagor and mortgagee may insure, each having an insurable interest. The law as to pro-rating is fully stated. Many American cases are cited.

Ibid.—19th June, 1891.

Nature of Securities upon which Trust Investments May be Made, by LYNE S. METCALFE, JR. American cases are cited.

Ibid.—3rd July, 1891.

Actions Against Telegraph Companies for Injuries to the Feelings, by SEYMOUR D. THOMPSON. In some American Courts the the action is held to lie. The rule is said to be clearer where the mental is coupled with physical pain. The damages are not given as exemplary, but as compensation to the injured party.

Ibid.—10th July, 1891.

Accident and Surprise—New Trial for the Unavoidable Absence of a Party or His Attorney, by FRANK E. BEEMAN. The American practice is stated with cited cases.

Ibid.—17th July, 1891.

Forfeiture of Membership in Benefit Societies for Non-Payment of Contributions and Dues, by EUGENE MCQUILLIN, continued and concluded in the two numbers following. Such societies may pass rules for forfeiture, which, however, are construed strictly. The distinction is pointed out between forfeitures which become so *ipso facto* on the prohibited act done, and those in which a declaration of forfeiture is necessary. The mode of assessment is then dealt with. Excuses for non-payment follow; such as war, when the society is the assured's debtor, acts of God, and then waiver and estoppel.

Ibid.—7th August, 1891.

Land Contracts, by WILLIS L. HAND. The nature of the vendor and vendee's interests are stated, and the remedies of the vendor's American cases are cited.

Ibid.—14th August, 1891.

The Power of the Court of Equity to Give Relief Against a Judgment at Law, by GEORGE P. VOORHEES. American cases are cited.

Ibid.—21st August, 1891.

Cipher Telegrams, by SEYMOUR D. THOMPSON. Where a message is unintelligible the company is entitled to notice of the special circumstances enhancing the damages, otherwise the damages will be nominal. The agent for receiving the message is also agent to receive notice of the circumstances, and the notice may be oral. It is sufficient if the company is simply put on enquiry. Terms in general use in trade or business are not cipher. A stipulation that a cipher message must be repeated to bind the company is reasonable. There are some cases which hold the company liable, if the cipher is written in the English alphabet, to the same extent as if written in ordinary language. English and American cases are cited.

Ibid.—28th August, 1891.

Agreement to Arbitrate as Condition Precedent to Maintaining Suit, by HUGH E. MILLER. The cases are cited in which it is held that an agreement to arbitrate does not bar the Courts of their jurisdiction. The distinction is then shown between these and the cases in which an award is necessary in order to constitute a debt for which to sue.

Ibid.—4th September, 1891.

Liability of Wife for Family Expenses, by D. H. PINGREY. American statutes making the property of both husband and wife liable for family expenses, and cases thereon are dealt with.

Ibid.—11th September, 1891.

Validity of State Regulations of Commerce, by JAS. WALTER YOUNG.

Ibid.—18th September, 1891.

Jurisdiction under Joint Debtor Acts, by LANCELOT M. KEAN. An essay on American Statutes as to actions against persons jointly bound.

Ibid.—25th September, 1891.

Comparative Characteristics of Notes, Bills and Checks, by NATHAN NEWMARK. American cases are cited.

Ibid.—2nd October, 1891.

Bicycle and Velocipede Laws, by W. W. THORNTON. Definitions are given from the lexicographers. A plea that a bicycle was a velocipede was not successful on a summons for unlawfully riding a bicycle between sunset and sunrise without a light. A bicycle is a carriage

within the meaning of a statute prohibiting the furious driving of a carriage on a highway. But it is not *ejusdem generis* with coach, sociable, chariot, etc., which were declared to be subject to toll although the Act imposed the liability on "every carriage of whatever description, and for whatever purpose, which shall be drawn or impelled, or set or kept in motion by steam or other power or agency." A tricycle driven by steam, but in other respects like an ordinary tricycle, and capable of being driven by the feet, was held to be a "locomotive propelled by steam." An American statute forbidding the use of a bicycle on a particular road of a turnpike company was held valid. A bicycle is a carriage or vehicle and entitled to the benefit of the rule of the road, and a person driving a horse must turn out for it; and its rider is not responsible for damage caused by frightening horses as he has a right to travel on the road. English and American cases are cited.

Ibid.—9th October, 1891.

Power of Corporation to give away its Stock, by SEYMOUR D. THOMPSON. A severe criticism of the decisions of the United States Supreme Court which hold that a corporation may give its stock without consideration, or adequate consideration, and that the donee is not liable to creditors of the corporation for the amount actually unpaid thereon.

Ibid.—16th October, 1891.

Ouster as Between Tenants in Common, by WM. L. MURFREE, JR. American cases are cited.



THE CANADIAN LAW TIMES.

AUGUST, 1892.

ONTARIO LEGISLATION, 1892.

WE have to reiterate the annual complaint as to the delay in issuing the statutes. The Legislature was prorogued in April or May last, the *Gazette* containing some of the statutes was published on 7th May, and at the time of writing, the end of July, it is impossible to get a copy of the statutes save those printed in the *Gazette*. That such a state of affairs should be tolerated seems strange; but every suggestion to hasten the publication of the statutes is passed over in silence. We have before shown that it is not impossible, nor even difficult, to issue the statutes within two or three weeks after they have been assented to; and why they should be laid on one side to be published at the leisure of the Queen's Printer is totally incomprehensible.

Those that we have access to include the usual amendments to the Division Courts Act, the Municipal Act, *et hoc genus omne*, without which our statutes would hardly be recognizable; but the legislation of this year also comprises several very important measures. Perhaps the most important is that which first strikes the eye in order of the chapters, namely, *The Succession Duty Act*.

The Succession Duty Act, 1892.—The preamble declares the purpose of the Act to be the raising of a revenue to meet Provincial expenditure for the support of asylums

for insane and idiots, the blind, and deaf mutes. "Property," as defined by the Act, includes real and personal property of every description "capable of being devised or bequeathed by will, or of passing on the death of the owner to his heirs or personal representatives." It is strange that the definition should have been so limited, as by the fourth section a succession duty is to be levied on property settled by voluntary "deed, grant or gift made in contemplation of the death of the grantor or bargainor, or made or intended to take effect in possession or enjoyment after such death." To reconcile the two sections, it must be held that the definitive clause describes the tenure of the property, not the property when or as devised, bequeathed or succeeded to, and that the fourth section determines when such property shall be subject to the duty. We have to note also that if the fourth section does not, the second section does, include an estate tail. All inheritable estates except fees tail pass to the personal representative now, subject to the peculiar provisions of the amended Devolution of Estates Act whereby they shift to the beneficiaries; so that estates "passing on the death of the owner to his heirs" would not include fees simple but would include fees tail.

After limiting the imposition of the duty to estates of certain value, and exempting property given to religious, charitable or educational purposes, the fourth section proceeds to state when the duty is to be imposed. Several conditions must concur in order to determine the property to be subjected to duty. (1) It must be situate within the Province; (2) the owner must have been domiciled in the Province at the time of his death or within five years previous thereto; (3) the property must pass either by will or intestacy; (4) any interest therein, or income therefrom, must be voluntarily transferred by deed, grant or gift, made in contemplation of the death of the grantor or bargainor, or made or intended to take effect in possession or enjoyment after such death (a) to any person in trust or otherwise, (b) or by reason whereof any person shall become beneficially entitled in possession or expect-

ancy. The section, as far as it deals with property settled by grant or gift is unhappily worded, and leaves it open to argument as to whether it is only when an interest or income is granted out of the property that the duty is to be charged or whether it includes also the property itself. To illustrate our meaning it is only necessary to extract the following: "All property . . passing by will or intestacy, or any *interest therein, or income therefrom*, voluntarily transferred by deed . . made in contemplation of death . . or . . to take effect . . after such death . . by reason whereof any person shall become entitled . . to any property, or the income thereof, shall be subject to a succession duty, etc." The change from the devolution of "property" by will or intestacy to the settlement of "any interest therein or income therefrom" by deed is remarkable, and quite as remarkable is the transition at a later place where the effect of the deed is to entitle the person benefited "to any property" by reason of the grant of the income thereof or interest therein. The section literally means that where property is granted voluntarily, to take effect at the death of the person, it is not affected by this clause; but where any interest in, or income from, the property is so granted that interest or income shall be subject to duty. Judicial legislation may include the voluntary grant of the property itself, but not the words of the clause.

The sub-sections of this section fix the rate to be levied according to the value of the property. It will have been observed that the tax is imposed only on "property situate within this Province." The first sub-section fixes the rate "where the *aggregate value of the property of the deceased* exceeds $100,000, and passes in manner aforesaid, etc." In computing the property to be assessed this clause does not confine us to the property situate within the Province, but refers us to the aggregate value of the property of the deceased. In the case of a deceased person owning property both in Ontario and say Manitoba, are we to take the grand aggregate and levy the duty on the Ontario property only? It is declared that where the property passes, either in whole or in part, etc., the same

or so much thereof as passes to father, etc., shall be subject to the duty. If then property of the value of $50,000 in Ontario passes with property of the value of $51,000 in Manitoba, the aggregate being over $100,000, under this section will "so much thereof" as is in Ontario and passes to the father, etc., be subject to duty, or will it be exempt because the Act only affects property within the Province, and the aggregate amount in the Province is less than $100,000? The usual open space is left as an arena for a legal fight. The same remarks may be made as to other sub-sections fixing the tariff.

By the next section provision is made for security to be given, and information afforded for the purpose of the duty. Then follow the clauses as to appraisement. And here a difficulty arises as to the duty to be levied on future estates. If the Treasurer of the Province is not satisfied with the valuation of the executor or administrator, the Sheriff, at the request of the Surrogate Registrar, is to appraise the value of the property "at its fair market value," and make a report to the Registrar. On receiving the report the Registrar shall "forthwith assess and fix the *then* cash value of all estates, interests, annuities and life estates, or terms of years growing out of such estate, and the duty to which the same is liable, . . and the value of every future or contingent or limited estate, income or interest shall, for the purpose of this Act, be determined" by the rules employed by the Inspector of Insurance in valuing policies "and the Inspector of Insurance shall, on the application of any Surrogate Registrar, determine the value of such future or contingent or limited estate, income or interest, upon the facts contained in such report." By the eleventh section it is enacted that, "in all cases where there has been a devise, descent or bequest of property . . to take effect in possession, or *come into actual enjoyment after the expiration of one or more life estates, or a period of years*, the duty on such future estate or interest shall not be payable . . until the person or persons liable for the same shall come into actual possession of such estate or interest by the determination of the estates for life or years, and

the duty shall be *assessed upon the value of the estate or interest at the time the right of possession accrues as aforesaid.*" The directions contained in these sections, shortly, are, that the executor or administrator is to swear to the value, and if not satisfactory, the sheriff is to appraise the property at its fair market value; the Registrar shall assess the *then* cash value of all estates, and future contingent or limited estates are to be valued by the Inspector of Insurance upon rules for ascertaining the present values of property to be enjoyed in the future; the duty payable upon a future estate is not to be payable till the estate comes into actual enjoyment of the owner after the falling in of the prior estates; and the duty is then to be assessed upon the value of the estate at the time when the right of possession accrues. Here is a direct contradiction as to the mode of valuing a future estate for the purpose of the duty. The valuing of a future estate upon known rules for ascertaining present values, can be done for no other purpose than to ascertain the value for the purpose of assessing duty. The Registrar is to ascertain this cash value and the duty at the same time. The postponement of payment by the person entitled to the future estate is a measure for the convenience of the person to pay the tax. If the clause had stopped there, no difficulty would have arisen. Why then declare that the duty is to be assessed on the value of the future estate when it becomes an estate in possession? It will be noticed that the clause does not merely say that the duty previously fixed is to be levied on the property when it becomes an estate in possession, but that the duty is to be assessed on the value of the estate when it becomes an estate in possession; that is, the *then* cash value, and the value, not as a future estate but as an estate in possession. The same property pays first a duty on the life estate, then a duty on the whole estate in fee simple, unless the meaning of the words can be altered so as to do away entirely with the last clause of the eleventh section, or reduce it to signify that the duty is to be levied on the property, not assessed on its value.

Power is given to the Surrogate Judge to extend the time for payment of succession duty on the application of the person liable, if it appears to the Judge that payment within the time prescribed is "impossible owing to some cause over which the person liable has no control"—a comfortable space being thus afforded to the wriggling devisee or legatee, who will be apt very often to find that he cannot control his financial affairs. The measure is one of great generosity to the legatee, as the fifteenth clause enables executors, administrators and trustees to sell the property of the deceased in order to pay the duty, and the fourteenth section requires them not to hand over property till the duty is paid.

Where debts are proved against the estate after administration, whereby legatees have to refund, a proportion of the duty is to be repaid if already paid.

Tax sales in Algoma and Thunder Bay.—Provision is made by chapter seven for the Crown to buy in for the taxes and costs lands exposed in these districts for sale for arrears of taxes, when the lands do not bring the amount of taxes and costs against them, and the lands again become Crown lands of the Province, subject to the owner's right of redemption.

Provincial Fisheries.—An Act for the protection of the Provincial Fisheries is by its first section confined in its application to waters "over or in respect of which the Legislature of this Province has authority to legislate for the purpose of this Act," beyond which, of course, even in the absence of the limitation the Legislature could not have legislated. The waters to which the Act applies are, however, defined in the next section to include such of the waters of any lake, river, stream or water course wholly or partly within the Province as flow over or cover any Crown lands. And Crown lands are defined to mean ungranted lands of the Crown "whether or not any waters flow over or cover the same." Combining sub-sections one and two of section two, the definition reads, "'waters' shall include such of the waters of any lake as cover any of the ungranted lands of the Province, whether the water

flows over such ungranted lands or not,"—which will aid largely in expounding the phrase in the first section by which the Act is limited to fishing in waters over or in respect to which the Legislature has authority to legislate.

Inasmuch as the Act (aided by nature) is confined to waters covering Crown lands, probably no question of its constitutional validity will be raised if the decision of the Supreme Court in *Regina* v. *Robertson* (*a*) is to govern, although the Dominion Government disputes the right of the Province to legislate respecting the waters of the great lakes and other public navigable waters in the Province (*b*). And the Act does not in terms affect these waters, but leaves it open to judicial determination whether they are waters with respect to which the Province has the right to legislate. Not much doubt can exist as to the right of the Province to legislate upon the property of fisheries in waters covering Crown lands. The lands are the property of the Crown in right of the Province; so are the fisheries, which might be separated from the property in the land and granted separately. If the Province, then, owns the fisheries, can grant them or withhold a grant, it can undoubtedly restrict altogether the use or permit it in a qualified manner by Act of the Legislature. It would be an anomalous thing that the Crown in the right of Canada should control and regulate the property of the Crown in the right of a Province. Or to put it as Strong, J., did in *Holman* v. *Green* (*c*): "Who ever heard of such an anomaly as the Crown, as a body politic representing one Government, having a franchise in the property of the Crown itself as a body politic representing a distinct Government?" The Dominion Parliament could not by any means legislate concerning the property of the Province.

The "tourist" or "summer visitor" here for the first time obtains legal recognition, and signifies a person who during the spring, summer, or autumn months temporarily visits, boards, or lodges in any locality at a distance of

(*a*) 6 S. C. R. 52; 2 Cart. 65.
(*b*) See *ante*, p. 159.
(*c*) 6 S. C. R. 707; 2 Cart. at p. 157.

over five miles from his usual place of residence. He shall not take or kill more than one dozen bass a day, nor bass of less than ten inches in length. The summer visitor may show, however, that the offence did not take place in the spring, summer or autumn months, and great liberty will be allowed him between Lake Ontario and Hudson's Bay if there is anything in latitude to determine when spring commences and autumn ends.

By the third section "close season" is defined to mean any time during which fishing "is prohibited or regulated by the laws or fishing regulations of Canada"; and by the thirteenth section penalties are fixed for infraction of the close season laws and regulations. Are these penalties cumulative upon those fixed by the laws of Canada? At any rate, if already provided for by a jurisdiction recognized as lawful by this Act, why add to the prohibition?

Grand Jurors.—Chapter twelve reduces the number of grand jurors to be summoned from fifteen to thirteen, and repeals the Act 42 Vict. cap. 13, providing for fifteen to be summoned instead of twenty-four. That Act was not to come into force until a proclamation of the Lieutenant-Governor was issued declaring it in force, and the proclamation was never issued. The present Act is not to come into force until a proclamation is issued. No doubt some means will be taken to test the constitutionality of the Act, as to which different opinions prevail, before such a proclamation is issued.

Evidence.—By the Evidence Act, section 9, on the trial of any proceeding under any Act of the Legislature of Ontario, or on the trial of any proceeding before a justice, mayor, or police magistrate, *not being a crime*, the defendant, or husband or wife of the defendant, is a competent and compellable witness. This clause is amended by chapter fourteen, section one, by striking out the words "not being a crime" and inserting the word "such" before proceeding, etc., before a justice. Probably no material change is made by the amendment, as the clause now reads (paraphrased), "On the trial of any proceeding under any Act of the Legislature of Ontario, or on the

trial of any *such* proceeding before a justice." It merely assumes that a trial under an Act of the Legislature may be in respect of a crime, *i.e.*, a provincial crime or offence.

By the second section of this Act the provisions of chapter twenty-one of 53 Vict., by which when a registrar of deeds is subpœnaed to produce original papers he may produce them and leave certified copies, are extended to registrars of the High Court, registrars of the Surrogate Court and Clerks of the Peace. By Rule 583, certified copies of any papers in any office of the High Court are admissible in evidence to the same extent as the originals would be. As to High Court papers this would seem to be all that was necessary; but if anything was required in aid of it, why confine the measure to registrars? There are papers not in the custody of registrars which sometimes must be produced, and no such provision is made as to them. As to Surrogate registrars or Clerks of the Peace the provision is new and useful.

Algoma and Thunder Bay Courts.—Chapter eighteen, section 2, declares that two sittings of the High Court shall be held in each year after 1892 at Sault Ste. Marie and Port Arthur instead of one as heretofore, and the cruel provision is added that neither of them shall be in the long vacation. How time is to be spared for this under the present state of affairs the Legislature does not point out; but the judges may dispense with any of the sittings if they are not required for the administration of justice.

Mortmain and charitable uses.—Chapter twenty is a new departure in the law of mortmain. By section four land may be devised to or for the benefit of any charitable use, but it must be sold within two years of the death of the testator, or such extended period as may be determined by the High Court. If not sold within the limited time it vests in the Accountant of the Supreme Court of Judicature, and the Court is to cause it to be sold, for which purpose it may make orders respecting the trustees or to remove them; but if the trustees are the trustees of the charity, as they will often be, are they to be removed from the whole trust or only the trust for sale? By the third clause

"land" includes tenements and hereditaments, corporeal or incorporeal, of any tenure; but not money secured on land or other *personal estate arising from or connected with land*, which presumably excludes leaseholds from the operation of the Act. By section eight money secured on land and other personal estate arising from or connected with land are not to be subject to the Mortmain Acts. So that leaseholds being entirely exempt from Mortmain laws, these laws may be entirely evaded by devising land for long terms to religious or charitable uses. No reason can be suggested for such a provision, and it probably was not intended; but the Act is most happily worded to exempt leaseholds altogether unless judicial legislation can amend it.

In order to prevent evasion of the Act by bequeathing money to be laid out in land, the High Court is authorized to permit it to be so laid out if the will directs it, on being satisfied that the land to be so purchased is required for actual occupation for the purposes of the charity and not as an investment.

Preferences and sureties.—In *Hope* v. *Grant* (*d*), it was held that a transfer to a surety for an insolvent was not a preference of a creditor within the meaning of the Assignments and Preferences Act. By chapter twenty-five the word "creditor" in the amended Act is now to include any surety and the indorser of any promissory note or bill of exchange (why not the drawer of a bill?) who would on payment by him of the debt for which he is surety become a creditor.

Chattel mortgages.—These instruments and bills of sale under the Act are now by chapter twenty-eight to include instruments covering property not the property of the mortgagor or bargainor or the time of mortgage or sale, and after-delivered goods. Creditors, as against whom chattel mortgages and bills of sale are void, will now include simple contract creditors suing on behalf of themselves and other creditors, and any assignee for the

(*d*) 20 Ont. R. 623.

benefit of creditors as well as execution creditors. By the third clause the actual and continued change of possession mentioned in the Act is to be "such change of possession as is open and reasonably sufficient to afford public notice thereof." As that was the judicially determined policy of this Act before this enactment, the explanation is not very explicit and will hardly aid in determining what is a change of possession. By the next section, taking possession is not to aid a chattel mortgage or bill of sale, which would not without it be valid as against creditors, purchasers or mortgagees becoming such before such taking. This may have a peculiar result., A chattel mortgagee finds the security defective. A debt is then created by the mortgagor. The new creditor has absolutely no right to touch the goods, not having judgment and execution. Before he obtains them, the chattel mortgagee seizes and sells. No one objects; but the new creditor sues and obtains execution and contests the validity of the mortgage, the seizing and selling, because he was a creditor under the new definition of this Act, and the mortgage was void as to him. *Quære*, is it intended to effect a mortgagee who takes possession within the time fixed for filing his mortgage instead of filing the mortgage where he discovers that the latter is defective?

A much-needed but distorted measure is the fifth section by which, when goods are sold to a trader or other person for the purpose of re-sale, on the agreement that the property is not to pass till certain payments are made, such an agreement is void against creditors, mortgagees or purchasers unless it is put in writing signed by the parties or their agents and filed in the County Court of the county in which the goods are situate at the time of making the agreement, within five days of the delivery or possession of any of the goods. While some such measure was greatly needed, this might have been made more complete by requiring the agreement to be filed in the county where the goods are to be kept for sale. A manufacturer or merchant in Toronto sells goods on such an agreement to a merchant in London. The goods are made or kept in store in

Ottawa. Now, the persons to be protected are the retailers buying from the merchant at London. They might easily search in Middlesex for such an agreement. But instead of this very convenient arrangement, they must find out not only who sold the goods to the London merchant, but where he kept them before they were sold. His enquiries would thus have to be directed, perhaps, to a place where he would least expect to find information, and he certainly would not be safe without requiring the delivery of an abstract and verification before he bought his goods. Suppose a commission agent or merchant in Toronto sells on sample to one in London goods made in England. At the time of making the agreement the goods are either non-existent or they are in England. Clearly the Act cannot be operative; and yet a vast amount of business is done in this way. Such agreements are not to affect purchasers from the trader in the usual course of business. Does this mean that a retailer is not affected who buys from a wholesale merchant who holds goods on such an agreement in the usual course of business? Or does it simply mean that persons buying in shops at retail are not affected? If it is not to apply to the usual course of business, for what purpose was the Act passed? It is expressed to be applicable to sales to persons for purposes of re-sale—which means that the person selling and the trader are carrying on their usual business, and that it is for the usual business of re-sale that the goods are sold. Altogether, one may say that a most useful notion has been frightfully distorted.

The Act is not to affect the state of affairs provided for by the Conditional Sales Act.

Workmen's Compensation.—The Act and amendments thereto making employers liable to their workmen are consolidated in chapter thirty—a great boon, as the scattered amendments rendered the Act difficult to follow.

Landlord and Tenant.—The exemption from distress for rent again receives attention. The Provincial legislator has a great deal to answer for in his mode of drawing Acts and amendments; and his peculiar methods are well

illustrated in chapter thirty-one. By the twenty-seventh section of the Landlord and Tenant Act it is declared that the goods and chattels exempt from seizure under execution shall not be liable to seizure by distress for rent, nor shall such goods be liable to seizure for taxes unless they are the property of the person assessed; and the astute legislator has added to this clause the words: "Provided that in the case of a monthly tenancy such exemption shall only apply to two months' arrears of rent." He no doubt meant that the exemption from distress for rent should apply to two months' arrears only; but he has said that certain goods shall not be liable to seizure for taxes, and in the case of a month tenancy the exemption shall only apply to two months' arrears of rent.

Women as Lawyers.—Chapter 32 is as follows: "The Law Society of Ontario may in its discretion make rules providing for the admission of women to practice as solicitors." When commenting on this little enactment during its passage through the House we had not the text of the measure before us. The Law Society of Upper Canada, which retains its ancient name, along with its ancient traditions and discretion, may set up in answer to an application from a woman that it is still in the same plight as when such an application was before declined, and may refer the applicant to the unknown society mentioned in the Act for belief. Is it the draughtsman, the Queen's Printer, or the proof-reader who spells the verb practise with a "c" for the "s"?

Tobacco and minors.—Boys will now become of age for smoking purposes at eighteen. It is an offence against chapter fifty-two to sell, directly or indirectly, to a minor under eighteen years of age, cigarettes, cigars or tobacco in any form. Words importing the singular number shall, by the Interpretation Act, include more things than one, "and the converse"; whereby it is intended that words importing the plural shall include the singular; and therefore a single cigarette or cigar cannot be sold. Fruitful in device, the tobacco dealers promptly established machines

for the distribution of cigarettes, which in return for a cent inserted in a slot give out a cigarette. In a conspicuous place on the machine is a notice that minors under eighteen years of age are warned off. So that so far as the dealer is concerned he does not intend to infringe the Act, and if boys will disregard the notice why should he be punished? A parent or guardian may however send a child with a written request for tobacco. Will this extend to employer and office boy?

Drainage Trials Act.—Additional powers are given to the Referee under the Act, some amendments are made, and the Referee appointed under the Act is prohibited from practising as a barrister or solicitor and from acting in any capacity as a legal agent or adviser.

EDITORIAL REVIEW.

Unprofessional Conveyancers.

The mountains have been in labour and have brought forth a mouse. The Committee of the Law Society charged with the duty of reporting on the question of unprofessional conveyancers has made a report which has been adopted by Convocation and communicated to each member of the profession.

The report is as follows:—

Your Committee, having endeavoured to procure all possible information upon the subject referred, and having sought and obtained many suggestions from the various Law Associations and County Bars throughout the Province, all of which have received the best and most careful consideration of your Committee, finds that no aid can be accorded to the Profession except by means of legislation in the Provincial Parliament, and your Committee is met there with a difficulty at present insuperable by reason of the opponent feelings of such a large proportion of the members of the Legislature and the strong influence now used by unlicensed conveyancers throughout the Province. Your Committee would therefore suggest that the members of the Profession should, in their respective localities, use their influence, which is generally large, to induce their representatives to see that justice is done, and to obtain from them, if possible, some pledge that the interests of the Profession should receive the fair consideration of the House.

Your Committee suggests that it be continued so that any action that may hereafter appear to be advisable can be taken without any unnecessary delay.

Dated this 28th day of June, 1892.

H. H. STRATHY.
Chairman.

G. H. WATSON,
Vice-Chairman.

The only resource then is to procure legislation to prevent conveyancing by any person but one holding a license. Such a result is most unlikely to be attained. In the meantime we must continue to toast the unprofessional conveyancer as well as the man who draws his own will, for the litigation they produce.

The evil is not a modern one, by any means. The preface to the original edition of Sheppard's Touchstone is a quaint arraignment of him who "never read more law than is on the backside of Littleton," and includes as well members of our own learned profession (who perhaps, if conveyancing were allowed them to a profitable extent, would find it to their advantage to make themselves better conveyancers) as empirics. Here is the indictment:—"And considering withal the mischief arising everywhere by the rash adventures of sundry ignorant men that meddle so much in these weighty matters, there being now almost in every parish an unlearned, and yet confident, pragmatical attorney, (not that I think them all to be such) or a lawless scrivener, that may perhaps have some law books in their houses, but never read more law than is on the backside of Littleton, or an ignorant vicar, or it may be a blacksmith, carpenter, or weaver, that have no more books of law in their houses, than they have law in their heads, and yet as apt and able (if you will believe themselves) either to judge of a conveyance, and by the rules of law (of all which they are utterly ignorant) to determine of the strength and goodness of a title or estate already made, or to make a conveyance to transfer the property of things from man to man, as the most learned and best counsellor of them all; and therefore undertake with great confidence, and dispatch without any scruple, any business whatsoever offered to their hands: wherein they deal with men in their estates, as many that are called physicians (but in truth empiricks) deal with men in their bodies, (an evil, fit for the consideration of Parliament)."

And this conclusion, arrived at so many years ago is again arrived at by the Law Society Committee.

The editor continues in a strain so applicable to modern times that we cannot forbear a further quotation: "How they come to this their supposed dexterity and skill is a wonder, except that saying be false, *nemo nascitur artifex.* Either it must be born with them, or they must have it by education, or they must not have it at all. But if they will tell me they have good precedents, I will tell them that a good conveyancer must be as well able to judge of the validity of the title, and primitive estate of him that is to convey (which a man can never do without knowledge of the rules of law no more than a blind man can judge of colours), as to make a derivative estate and conveyance by a good precedent; for *scire est per causas scire,* as the philosopher speaks. And as well, for aught I know, may a man be an able physician by certain medicines only, that never read so much as the grounds of physic, as such men be able conveyancers by their precedents only, that never read so much as the maxims of law. *Nullum medicamentum idem est in omnibus.* For my part I must ingenuously profess that I can scarce look into a title or meddle with a conveyance of weight, wherein I cannot make and show more doubts and questions, than I am able to resolve and answer; and therefore these men have gotten the start of me much. And yet much marvel it is to see how these empiricks of the law (if I may so call them) are sought unto and made use of, and not only in lesser, but oft-times in greater and more weighty businesses, and that without the assistance of any others more able and sufficient; the which is not for lack of opportunity of finding more learned men in the law, for there is a sufficient store of them in all places; nor do those that employ these empiricks of the law, always save (if they think it would) money thereby; for, besides the great mischief which is oft-times done themselves by the unskilfulness of these workmen, some of them by reason of their much custom are grown more chargeable than an ordinary counsellor whose fee is certain and known." This charge cannot be laid to the modern empiric, for his fees have been placed so low that solicitors must perforce reduce theirs in order

to retain what business they have. The advice which the editor gives in the following passage may not be graciously accepted, but it is as good as can be given.

"But of these empiricks of the law and those that make use of them, I might say, as sometime our blessed Saviour said, *Let them alone, the blind leaders of the blind.* Howbeit, being now called (as I conceive) hereunto, I choose rather to admonish them, and to tell the first sort, that I conceive them to be usurpers upon, and intruders into, other men's callings, and that they thrust their sickles into other men's harvests and that they have not yet learned that rule of divinity, *To abide in the calling wherein they are called,* but exercise themselves in things too high for them; nor yet have they learned this, *Ne sutor ultra crepidam,* Let not the cobler go beyond his last; nor have they learned that, *In quo quisque norit in hoc se exerceat;* and let me tell the latter sort, that they heed not this saying *Caveat Emptor;* nor believe that saying, *Cuique in arte sue credendum,* that every man is to be believed in his own art. But if you will say to me, that these men do their work well, and their work doth succeed well; I will say to you, that the blind may happily hit the mark; and it may fall out that sometimes they do their work well, and it doth succeed well, but oft-times woeful experience showeth the contrary, and that many men have been much mischieved everywhere by the ignorance of these men."

So our committee has precedent both for the indictments of the blacksmiths, carpenters, weavers, and we may add at the present day, the school-masters and the justices of the peace, and for their abandonment of the matter to Parliament. Clearly, nothing can be done by the Society, and perhaps it is just as clear that nothing will be done by the Legislature.

The Manitoba School Act.

An important constitutional event is the decision of the Judicial Committee of the Privy Council affirming the constitutionality of the Manitoba Act establishing a uniform system of public non-sectarian schools, and subjecting all

property, without regard to the religious faith of its owners, to taxation therefor.

The peculiar phase which the question took was a motion to quash a by-law passed by the council of the city of Winnipeg to levy the annual rates, including a rate for public school purposes. Mr. Justice Killam upheld the by-law on the ground that the Act authorizing it was valid; the Full Court sustained him, Dubuc, J., dissenting; the Supreme Court unanimously reversed the decision of the Queen's Bench, Manitoba, and the Judicial Committee restored the original judgment.

The law was attacked on the wording of section 22, subsection 1 of the Manitoba Act.—"Nothing in any such law [respecting education] shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law *or practice* in the Province at the Union." It appeared from affidavits filed that Roman Catholics had schools which were distinctly denominational in the sense that they were supported exclusively by members of the Roman Church, by their private contributions, and the resources of the Church. And it was concluded that their privilege which was established "by practice" before the Union was prejudicially affected by the Public Schools Act, for two reasons, the first rather fanciful one being that the public schools exposed them to undue competition, the second that Roman Catholics were taxed for the support of the public schools which they could not conscientiously support, and their means being shortened by so much they were to that extent disabled from contributing to their own schools. On the other hand it was urged that the privilege which they had by practice was a mere privilege enjoyed by other denominations of keeping open voluntary schools, which was not in any way interfered with by the Act; that they had never, nor had any other denomination enjoyed immunity from taxation for any purpose, there having been no system of taxation in force before the Union for school purposes, and the claim to be free from taxation for school purposes was therefore not a privilege existing at the time of the Union. To this

was replied that the right to maintain voluntary schools was not a privilege acquired *by practice*, but an inherent right, and could not have been intended alone as a privilege to be protected.

Mr. Justice Killam took more pains in disposing of the argument founded on the alleged prejudicial effect of the competition of the public schools than it demanded. The argument was not, as far as the report shows, used, although it is the first that suggests itself, that there never could be competition with the Roman Catholic schools in the education of their youth, inasmuch as their youth are not allowed to frequent the public schools. And if the argument means that they offer a better education than the Roman Catholic schools, such competition would be most wholesome instead of being prejudicial. To assert the contrary would be to assert that the Constitution of Manitoba required the policy of the Legislature always to keep down the standard of education to a pitch fixed by a body who might at any time complain that educational facilities were being made too great.

The argument as to the alleged privilege of immunity from taxation was disposed of by showing that it did not exist as a privilege. Killam, J., held that the privilege secured to them was the privilege to retain their voluntary schools, and these were not interfered with. On appeal, Taylor, C.J., agreed with this, while Bain, J., did not regard the establishment of voluntary schools as a privilege within the meaning of the Act. He held, however, that they were not affected in any way by the legislation, and that the applicant had failed to show that there was any right or privilege to enjoy immunity from taxation for school purposes which was preserved by the Constitution.

In the Supreme Court, the history of the school legislation of Canada was largely dwelt upon, as it was in the Courts below; and the Court was unanimous in holding that the privilege of keeping up voluntary schools was not a privilege established "by practice," but a naked absolute right, and so not the privilege intended to be preserved by the Act. That regarding the previous history of the

struggle for separate schools the words "by practice" must be regarded in the same light as the words "by law." Therefore, if separate denominational schools were established "by law" before the Union they were protected, and if similar schools were established "by practice," as they held they were in Manitoba, they were also protected.

The reasons given by the Judicial Committee have not arrived at the time of writing; but we might venture to say that the argument that any religious class or denomination which had church schools established before the Union had in consequence of this section a right or privilege to be exempt from taxation for a public school system, has neither material nor reason for its basis.

A suggestion has been made that an appeal would lie to the Governor-General in Council from the Act under the second sub-section of the section quoted from. It differs from the British North America Act in one important respect. By the latter Act, when a system of separate schools exist in a Province, an appeal lies from any Act or decision of any Provincial authority. But by the Manitoba Act, without regard to whether a system of separate schools exists or not, it is enacted that "An appeal shall lie to the Governor-General in Council from any Act or decision of the Legislature of the Province, or of any Provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education." This being in amplification of the previous part in the section, the words "right or privilege" must have a cognate meaning, if not the same meaning, with the same words in the previous parts of the section, freed, however, from the extended signification given by the addition of the words "or practice," which do not appear in this sub-section. In *Ex p. Renaud*, 1 Pug. 273, 2 Cart. 445, it was held that these words in the British North America Act meant rights and privileges established by positive legal enactment. If that be their construction in this sub-section, appearing as they do without the qualification of the words "or practice," then it is plain that no right or privilege exists, as there was no law in force of

any kind respecting such matters. If, on the other hand, they are to be referred to the previous sub-section for their meaning and are to be construed as rights and privileges acquired by practice, then, inasmuch as the Judicial Committee has determined that exemption from taxation for school purposes is not such a right or privilege, this alleged privilege is not within the sub-section. And in either case no appeal would lie to the Governor-General in Council.

The third sub-section provides for remedial executive or legislative measures to be passed for the due execution of the provisions of the section, and cannot be called into play unless the rights or privileges spoken of are affected.

It must always be borne in mind that the only question settled, according to our system of jurisprudence, is the issue before the Court, namely, whether Roman Catholics or any other religious denomination can be assessed for the support of a public non-sectarian system of schools. It is open to litigate other questions, but the principle being established carries with it all other minor questions and practically settles the matter.

REVIEW OF EXCHANGES.

Law Journal.—12th September, 1891.

Discretionary Trusts. Cases are cited dealing with the principle on which trustees are authorized to pay or withhold income or property, and with the vesting or not vesting of the property.

Ibid.—19th September, 1891.

Capital and Income. The subject is dealt with as between life-tenant and remainderman. A complicated rule is laid down in *Re Foster*, 45 Ch. Div. 629, where there is a shrinkage of value in property on which money is lent on mortgage. The following rule is deduced from cases on retention of investments:—"Where a testator empowers his trustees to retain unauthorized investments, not of a wasting nature, the trustees must pay the whole of the income to the tenant for life, however high; but if the investments are of a wasting nature, then the tenant for life can only have the interest which he would have had if the wasting investments had been converted, unless the testator in effect directs that they are not to be converted."

Ibid.—26th September, 1891.

Tenants Holding Over. The length of time which it takes to evict an over-holding tenant is shown; and a case is cited where a landlord commenced to take down a house after the tenant's term had expired, and after he had been warned but refused to quit, and successfully defended an action for injury to the tenant's property occasioned by the pulling down.

Ibid.—10th October, 1891.

A New Case of Legacy Duty. Where a solicitor trustee is authorized by a will to charge for services which he would not, but for the will, be entitled to charge for, he is regarded as taking a legacy when he receives profit costs, and if he is a witness he forfeits the benefit under the will; on this principle the point is raised whether if he is not a witness and takes the profit costs he ought not to pay legacy duty.

Ibid.—24th October, 1891.

Titles Under Voluntary Settlements. Having regard to the English Bankruptcy Acts, it is said that a title cannot be made to a purchaser until the lapse of ten years.

Ibid.—31st October, 1891.

Building Society Shares held by Minors. A minor may give a valid acquittance under certain Building Society Acts, but a transfer of shares is thought not to be an acquittance.

Service out of the Jurisdiction. Continued and concluded in ten following numbers. Shows the origin and development of the practice.

Ibid.—14th November, 1891.

Duty on Settlements of Personal Property. Where a married woman had under a marriage settlement, a general power of appointment subject to her own and her husband's life interest, and she appointed in favour of her niece, it was held that the property appointed was subject to legacy duty: *Atty.-Genl.* v. *Chapman*, 60 L. J. Q. B. 602.

Ibid.—21st November, 1891.

A Married Woman's Advantages. The married woman's immunity from liability for debt, and her remedies against her husband for certain wrongs are enumerated, and constrasted with the want of remedy of the husband against his wife under similar circumstances.

Ibid.—19th December, 1891.

Newstead v. Searles in the Privy Council. In that case, 1 Atk. 264, a marriage settlement contained a limitation in favour of the issue of a marriage to take share and share alike with the issue of a former marriage; there were no issue of the marriage, and the husband and wife mortgaged the land. It was held that the mortgage was void as against the limitation in favour of the issue of the first marriage Other cases are cited in which this case has been dealt with. It has been said to be wrongly decided, to be an anomalous exception, to be right because the settlement in favour of the children by the former marriage was one of the terms of the bargain. But its final explanation by the Privy Council is that the limitation to the issue of the first marriage was so blended with that in favour of the issue of the second marriage, which was within the marriage consideration, that one could not take effect without the other. And it made no difference that there was no issue of the second marriage, because the settlement must be dealt with at the time of its execution.

Ibid.—26th December, 1891.

A Desk and its Contents. In *Re Robson*, 60 L. J. Ch. 851, an "old mahogany desk with the contents thereof" were bequeathed. It contained banknotes and cash in silver; a banker's deposit receipt, an unindorsed cheque, and unindorsed promissory notes, all payable to the testator's order; and the key of a tin box in which he kept securities and other papers. It was held that the banknotes, cash, cheque and notes passed, but not the contents of the tin box whose key was in the desk. Some comments are made, and cognate cases are cited.

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THE CANADIAN LAW TIMES.

SEPTEMBER, 1892.

ADMIRALTY JURISDICTION—MARITIME LIENS.

THE Exchequer Court of Canada has been declared a Colonial Court of Admiralty, with jurisdiction "over the like places, matters and things as the Admiralty Jurisdiction of the High Court in England." That jurisdiction is not based upon the existence of a maritime lien for the claim sought to be enforced, and in a few cases only does such a lien exist. The most satisfactory definition or description of a maritime lien I have met with, is that to be found in the judgment of Curtis, J., in the case of *The Young Mechanic* (*a*), amended as suggested by the Hon. John Mansfield in a valuable article on this subject published in the fourth volume of the Law Quarterly Review. "*It is an appropriation made by the law of a particular thing as security for the debt or claim, the law creating an encumbrance thereon, and vesting in the creditor a right in the thing which subsists from the moment when the debtor claim arises, and accompanies the thing even into the hands of a purchaser.*"

The special marks or characteristics of the maritime lien are:

(1) That it is independent of possession, and

(2) That it is not defeasible by any subsequent change of ownership of the property. Purchase for value without

(*a*) 2 Curt. 404.

notice will not defeat it. A sale of the ship, however, under the process of the Court under a judgment *in rem*, clears it of all prior liens and encumbrances, and such effect of the sale is recognized by a foreign power (*b*).

In the many cases which in recent years have been decided upon this subject, the principles upon which this lien is based have not been the subject of investigation, but the enquiry has been directed to the actual recognition and enforcement of such a lien by the Admiralty Court in the past. Mr. Mansfield has, however, endeavoured to ascertain what these fundamental principles are, and arrives at the conclusion that when the lien arises there exists "the *inaccessibility of the owner* of the property subject to the lien, coupled with two at least of the following elements, namely, *necessity*, *emergency*, some ground of *public policy* justifying the lien."

These enquiries, both historical and scientific, however interesting, have now ceased to have much practical importance, as it is finally settled that this lien arises in five cases only :—

(1) Seaman's Wages ;
(2) Master's Wages ;
(3) Salvage ;
(4) Bottomry and Respondentia ;
(5) Damage by Collision.

Of these the lien for master's wages was only created by statute, the 191st section of the Merchant Shipping Act (*c*) expressly declaring that every master shall have "the same *liens* and remedies for the recovery of his wages" as a seaman. It was for a long time considered that this lien extended to the master's disbursements on account of the ship, and it was so held in the case of *The Sara* (*d*), following prior decisions, but on appeal the House of Lords, by a unanimous judgment, determined finally that no lien exists for such disbursements (*e*).

(*b*) *The Trenton*, 17 C. L. J. 189 ; *The Jerome*, 6 C. L. T. 263.
(*c*) 17-18 Vict. cap. 104.
(*d*) 12 P. D. 158.
(*e*) 14 App. Cas. 209.

It is still doubtful whether the lien for damage extends to personal injuries. Where jurisdiction has been exercised in such cases, it has been based on the provisions of the Admiralty Court Act, 1861 (*f*), and not upon the ancient practice of the Court, or by existence of a maritime lien (*g*).

It was often assumed that there was a maritime lien for ordinary towage services, but the point had never been expressly decided. In the case of *Westrup* v. *Great Yarmouth Steam Carrying Company* (*h*), decided in December, 1889, Kay, J., after reviewing the cases, concluded that the weight of authority negatived the existence of the lien, and dismissed the tug-owner's claim. Of course, where the towage is in the nature of salvage, the lien arises for the services rendered in the character of salvage.

It may be well to enumerate the claims over which the jurisdiction of the Exchequer Court extends, but which do not give rise to a maritime lien. They are :—

(1) Claims for necessaries supplied to any ship elsewhere than in her home port, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in Canada (*i*).

(2) Claims for damage to cargo imported into Canada, subject to the like limitations arising from the domicile of a ship-owner (*j*).

(3) Claims arising between co-owners touching the ownership, possession, employment and earnings of any ship registered in Canada (*k*).

(4) Master's disbursements on account of the ship (*l*).

(*f*) 24 Vict. cap. 10, secs. 7 and 35.

(*g*) *The Sylph*, L. R. 2 A. & E. 241 ; *The Vera Cruz*, 10 App. Cas. 59 ; *Smith* v. *Brown*, L. R. 6 Q. B. 731 ; *The Victoria*, 13 P. D. 125 ; *The Walter S. Frost*, 5 C. L. T. 471.

(*h*) 43 Ch. D. 241.

(*i*) 24 Vict. cap. 10, sec. 5 ; 53-54 Vict. cap. 27 (Imp.)

(*j*) 24 Vict. cap. 10, sec. 6.

(*k*) 24 Vict. cap. 10, sec. 8.

(*l*) 24 Vict. cap. 10, sec. 10 ; 17-18 Vict. cap. 104, sec. 191.

(5) Claims under mortgages, whether the ship or its proceeds be under arrest or not (*m*).

(6) Claims for building, equipping, or repairing, if at the time of the institution of the cause, the ship or its proceeds are under arrest of the Court (*n*).

It will be observed that in the case of a claim for building, equipping, or repairing, it is only when the Court is already seized of the subject matter, by the arrest of the ship or its proceeds, in some cases, that the Court has jurisdiction over such a claim. Proceedings to enforce any of these claims may be taken either *in rem*, or where a personal liability exists *in personam*. The arrest of the ship has the effect of creating what may be called a lien for the the claim, which cannot be defeated by any subsequent disposition of the property by the owner.

ST. CATHARINES.

R. GREGORY COX.

(*m*) 24 Vict. cap. 10, sec. 11.

(*n*) 24 Vict. cap. 10, sec. 4.

MATTERS OF TITLE AND MATTERS OF CONVEYANCE.

The distinction between matters of title and matters of conveyance is an important one, and worth illustrating by example. It is important in that a matter of title must be made the subject of an objection in examining and obtaining proof of title, at the risk of waiving it if the objection is not made; while a matter of conveyance need not be made the subject of an objection, but lies open, so to speak, until the title is accepted, and belongs to that stage at which the transfer of the property is to be made after perfecting the title.

Questions of title and questions of conveyance very often come so near the boundary line between them that it is difficult to determine whether the matter belongs to the one or the other. The illustrations which judicial decisions afford are of the greatest assistance in sharpening the distinction.

The design of the abstract is to exhibit to the purchaser such a state of facts and circumstances that, if proved to be correct, will enable the vendor either to convey or to compel or procure a conveyance to the purchaser of both the legal and equitable estates. It follows, as a matter of theory, that if the abstract is proved to be correct, nothing remains to be done but procure the conveyance from the necessary parties, there being frequently concurring parties who must join with the vendor, or who for greater safety may be required to join. An objection to title is thus seen to belong to one stage of the enquiry—a matter of conveyance to another.

A rule as to the distinction between matter of conveyance and matter of title, general in its terms, has been formulated by Lord Langdale, M.R., in these words: "I apprehend a question of conveyance arises in this way. Where an interest is vested in a party to secure a right, the satisfaction of which right entitles the party who has sold the estate to call for a

conveyance, then the Court considers it a question of conveyance only, but I think it has never gone further than that. If the estate be vested in a person, not for the purpose of enabling that person to perform a duty to others, then, until that duty has been performed, there can be no right to call for a conveyance" (*a*). And we may add the question is then one of title. The first part of this general rule may be illustrated by the ordinary case of an incumbrance. The mortgagee holds the land as security for a right. When he is satisfied a conveyance can be compelled; and the question is merely one of conveyance if the mortgagee is in a position to be paid off and satisfied at the desire of the mortgagor-vendor. But if the land has been conveyed upon trust, then, under the second part of the rule, there are duties to be performed; and until the duties have been performed there is no right to call for a re-conveyance, and so the question is one of title. In the case just cited, the facts were that the owner of land committed an act of bankruptcy, and afterwards took the benefit of an Insolvent Debtors Act. The estate in the land became vested by conveyance in the assignee of the insolvency, who had certain duties to perform in carrying out the directions of the Insolvent Act. The debtor was subsequently declared a bankrupt; and the assignee in bankruptcy sold the land, and it was held that he could not make a good title. And inasmuch as the assignee in insolvency could not be compelled to convey, and the proceedings in bankruptcy did not override the voluntary conveyance to the assignee, the question was one of title and not merely of conveyance. Subsequently the assignee confirmed the sale and agreed to concur in the conveyance, and thereupon it was reported that a good title could be made, and specific performance was ordered (*b*).

To continue with cases in which the objection was said to have been one of title. In *Wynne* v. *Griffith* (*c*), certain persons having a power of appointing certain

(*a*) *Sidebotham* v. *Barrington*, 3 Beav. at p. 528.

(*b*) S. C. 5 Beav. 261.

(*c*) 1 Coll. 283.

lands executed conveyances in trust, but the abstract did not show in whom the legal estate was outstanding. The vendor was entitled to the equitable estate, and to direct the conveyance of the legal estate. It was argued for the vendor that if the legal estate was outstanding in the representatives of the trustees it was in a person or persons who would be bound to convey at the direction of the settlors and so execute the trust. If there had been an adverse claimant it would have been necessary for the vendor to show that the person in whom the legal estate was had agreed to concur in the conveyance. But in the absence of an adverse claimant, the vendor being the owner of the equitable fee and having the uncontested right to direct the person who had the legal fee to convey to the purchaser, the abstract showed a good title, and it would be time enough to discuss the getting in of the legal estate when the conveyance came to be settled. To this it was replied that the legal estate had been outstanding for some time, and there was nothing to shew either in whom it was vested, or whether he who had it was ready to convey and capable of conveying. It was conceded that where the legal estate was in a person who was ready to convey, it became a question of conveyance merely. But here the abstract did not show who had it. The Master of the Rolls, Lord Gifford, said, "Supposing the Master to be right in his opinion that the legal estate is outstanding, the abstract does not shew where the legal estate is. How then can it be alleged that it shews that the plaintiff is able to make a good title? I must hold the question raised in this exception to be a matter of title and not of conveyance."

From these two cases it appears that if the owner of the legal estate is not shown, or if being shown he is not liable to be compelled to convey, the objection goes to the title and is not a mere matter of conveyance.

Of a somewhat similar class are *Page* v. *Adam* (*d*) and *Forbes* v. *Peacock* (*e*), save that in these cases equitable

(*d*) 4 Beav. 269.

(*e*) 12 Sim. 528; 1 Ph. 717.

interests were supposed to be beyond the control of the vendor. In taking these cases as illustrations of the rule we must warn the reader that they are cited for the general principle enunciated on the hypothesis that the decisions were correct on the state of facts presented, not as authorities for the particular principle involved in these and similar cases, into the principle of which we do not propose to enter. In the first case there was a devise subject to payment of debts and annuities, and the question was whether the devisee could make a good title without the concurrence of the annuitants. It was held that that question, depending upon whether the devisee could give a valid discharge for the purchase money, or whether the purchaser was bound to see to its application was one of title and not of conveyance.

In *Forbes* v. *Peacock*, the same question arose, and although the decision was reversed, on the ground that the devisee could give a discharge for the purchase money and that the purchaser was not bound to see to the application thereof, the remarks on the nature of the objection are not only useful as illustrating the subject, but are applicable to cases in which the concurrence of parties other than the vendor is necessary. Shadwell, V.C., said, "Lastly, it was said that this is a matter of conveyance only; but I do not think so, and for this reason; because, in order to convey and make a good title, the person to convey must not only have the power of conveying the legal estate, but have, in himself or others over whom he has dominion, the power of conveying all the equitable interest as well. If a person has the whole equitable estate in himself, and there is a trustee who has got the legal estate in him, if the question were whether he who has got the equitable estate, has a good title, you would say, in common language, that he can make a good title; because he can convey the whole beneficial interest, and has a power of compelling a conveyance of the legal estate. In this case Mr. Forbes, the executor and trustee, has a power to convey the legal estate; but he cannot, by any act of his own, give the intended

purchaser an effectual receipt for the purchase money, that is to say, he cannot convey the equity to the purchaser. He may convey the legal estate; but he has no dominion over the devisees of the money, so as to compel them to give the equitable interest in the estate; and therefore it appears to me not to be a matter of conveyance merely, but a matter of title."

Macklin v. *Dowling* (*f*) is a case *sui generis*, but it well exemplifies the strength of an objection to title where the matter was one of incumbrance. The facts were peculiar. A mortgage of the land in question was made to Ridout and Buchan, trustees appointed by and for The Canada Agency Association. The mortgage money was advanced by the Hon. Emily Noel Hill through the association as her agents, the latter guaranteeing to her a somewhat lower rate of interest than the mortgage bore, retaining for their own profit all over the rate guaranteed. Pending the mortgage an Act was passed vesting all the mortgages and other securities held by the association in The Colonial Securities Company. Miss Hill was not named in the Act, and being a private Act it did not bind her. Subsequently the mortgagor released his equity of redemption to the Colonial Securities Company in full satisfaction and discharge of the mortgage moneys. It was also provided that there should be no merger, but that the mortgage should continue a valid and subsisting security, and the mortgage was assigned to trustees, for the purpose, it was said, of attending the inheritance in the lands. Afterwards an Act was passed vesting all lands, mortgages, and securities held by The Colonial Securities Company in the Colonial Trusts Corporation. The Colonial Trusts Corporation then made a conveyance to the vendor. The objection was taken that the vendor did not own the equitable estate which was vested in Miss Hill. Ferguson, J., in giving judgment sustaining the objection, said, "The trust in her favour is an express trust. The Statute of Limitations did not run against her. Assuming that the enactments that have been

(*f*) 19 Ont. R. 441.

referred to have all the force contended for by the plaintiff, they could not have, nor could they have been intended to have the effect of operating the destruction of the rights of the *cestui que trust*, whose claim and right, assuming it to be still existing, is not confined to the mortgage money and the interest thereon. She would, in such case, be in equity entitled, adopting the transaction of her trustees in taking the release, to the land, or to the mortgage plus the equity of redemption in case there was no merger. In any view that I am able to have of this matter, there is, if Miss Hill's claim has not been satisfied, an equitable interest outstanding in her which is not necessarily a matter of encumbrance or conveyancing, but a matter of title, as such being an equitable right to the land itself or to the mortgage, plus the equity of redemption, as the case may be." Shorn of its complications, this case simply shows that where the vendor holds the land in trust for another and he cannot make out a good title without the concurrence of the beneficiary, and the objection then goes to the title, not to the conveyance. In other words, the abstract does not show that he can convey both the legal and equitable estates in the land.

The common case of a removable incumbrance is an illustration of the matter of conveyance. The matter is elucidated by stating the truism that the estate in the land may be in different persons, but if the vendor has the control of all the estates and may compel conveyances of them and the abstract shows this, then a good title is shewn, and it is a mere matter of conveyance to get them in. Where there are incumbrances on the land which are removable by the vendor, he has control over the different estates and interests. And so he shews a good title in that respect—that he can convey, or procure the conveyance of, the legal and equitable estates in the lands.

In *Townsend* v. *Champerdown* (*g*), an estate was sold free from incumbrances. It appeared that the estate was incumbered to a large amount, but the Master reported that a good title was shewn. On exception to the report Lord

(*g*) 1 Y. & J. 449.

Chief Baron Alexander said, "that he had conferred with the Vice-Chancellor and some of the judges; and the whole of them considered the mortgage in this case as a matter of conveyance and not of objection to the title; and upon inquiry, he found that a mortgage had constantly been treated by him as such in his office, whilst one of the Masters of the Court of Chancery." And he overruled the exception.

There must be, however, ability on the part of the mortgagor's vendor to remove the incumbrance, *i.e.*, he must be able to compel a re-conveyance or release; and the ability is not tested by his financial condition, but by the obligation on the mortgagee to re-convey on receiving his money. As put by Spragge, C., in *Graham* v. *Stephens* (*h*), "A doubt is suggested as to the finding that the plaintiff Graham was ready and willing to discharge the mortgage if the defendants had paid the instalment. Does it mean that he was in a position to do it? To be in such position he must have been on his part ready with the money, and the mortgagees ready to accept it. The finding," he continued, "is somewhat ambiguous. Graham could have placed himself in such position by giving the notice to the mortgagees which he did not give; but he may have been in such position by a readiness on his part to pay, and a readiness on the part of the mortgagees to receive interest for six months, instead of notice. * * It could be only a question of conveyancing, not a question of title." In that case there was a covenant by the mortgagees to accept their money at any time on six months' notice being given. So that the mortgagor had the power to compel re-conveyance upon giving six months' notice of intention to pay and payment.

If the mortgage had not matured and the mortgagee had not agreed to accept his money, of course the vendor could not have compelled the re-conveyance, and as he sold the estate free from incumbrances the objection of the existing mortgage would, in that case, have been an objection to the

(*h*) 27 Gr. at pp. 49, 440.

title. In connection with this, however, attention must be called to the provisions of the Act, R. S. O. cap. 100, sec. 15: "Where land subject to any incumbrance, whether immediately payable or not, is sold by the Court or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court of the amount sufficient to meet the incumbrance and any interest due thereon." And provision is also made for an additional sum to cover contingencies. "Thereupon the Court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the Court thinks fit, declare the land to be freed from the incumbrance; and make any order for conveyance, or vesting order, proper for giving effect to the sale; and give directions for the retention and investment of the money in Court." Power is also given to pay out the money to the persons entitled. Although this was not passed for the purpose of enabling every vendor to come to the Court to aid him with his title; it undoubtedly gives power, if the Court will exercise it, to order a conveyance to or vest the land in the purchaser when the vendor has it not in his power to obtain a re-conveyance either by reason of the nature of the charge, or by reason of its not having matured. The Act is permissive only; and Pearson, J., in *Re G. N. R. Co. & Sanderson* (*i*), refused to order payment into Court by the vendors at the request of the purchasers, where the amount to be paid in was largely in excess of the purchase money, and the vendors had a clause in the contract entitling them to rescind on objection by the purchaser, which liberty they availed themselves of. But in *Milford Haven R. & E. Co.* v. *Mowatt* (*j*), the same learned judge where the validity of a mortgage was in dispute, took advantage of the Act to order payment into Court and vest the property in the purchaser in order to protect him.

Bearing in mind the provision of this Act, it may perhaps reduce the question of removing an incumbrance to one

(*i*) 25 Ch. D. 758. (*j*) 28 Ch. D. 402.

of conveyance in every case. Assume that a vendor agrees to sell free from incumbrances. It appears that there is a mortgage on the lands not yet due; and though the mortgagor was of the belief that he could get it removed he finds before completion that he cannot without the aid of this section. Under such circumstances, can the purchaser object to the title? Or, may not the vendor say, "It is no objection to the title. It is now one of conveyance only. I will apply to the Court for leave to have a sufficient amount paid into Court to meet this incumbrance and will ask the Court to vest the land in you. If I do that there is no objection to the title." Under such circumstances the purchaser could not reasonably refuse to complete. The point, as far as the writer knows, has not yet been raised, but it would be an interesting one, and is apparently sound.

Outstanding satisfied terms stand in the same position as mortgages of the fee. In *Avarne* v. *Brown* (*k*) the abstract showed the equitable fee to be in the vendor, and the legal estate to be outstanding for a term, and subject thereto in a trustee. Shadwell, V.C., distinguishing this case from *Wynne* v. *Griffith* (*l*), where the abstract did not show who had the legal estate, said, "It appears to me that when an abstract shews that the equitable title is vested in the vendor, and that the legal estate in fee and a mortgage term are outstanding in certain persons, it shows a good title; and, though the owner of the legal estate in fee, or the termor and the person representing him may subsequently die, yet a good title is shown, when it is shown that the vendor has the whole equity, and in what person the outstanding portion of the legal estate is vested."

To the same effect is *Berkeley* v. *Dauh* (*m*), where a term of ninety-nine years, of which nineteen were unexpired, was outstanding in a trustee to attend the inheritance, all the trusts being performed. Sir Wm. Grant, M.R., said, "This appears to me to be a question of conveyance, not of title. The reference to the Master was to inquire, whether the vendor can make a good title. I am

(*k*) 14 Sim. 303. (*l*) Supra. (*m*) 16 Ves. 380.

at a loss to say how he cannot when he has vested in him, legally or equitably, all the interest in the estate. The allegation is, not that he cannot, but that he will not, make a title; *i.e.*, that he will not do those acts which are necessary to give a complete title to the purchaser. Mr. Preston's reasons for the purchaser's insisting upon an assignment of this term may be very good. That question will arise afterwards when the Master comes to settle the conveyance; but at present a vendor has the power, provided he will take the means necessary for the purpose of making a good title."

So, where the outstanding legal estate is otherwise under the direction, or we might say the compulsion, of the equitable owner, he can make a good title, and the objection that it is outstanding is one of conveyancing only. Thus, in *Jumpson* v. *Pitchers* (*m*), a woman, party to a suit, was ordered to convey. She was married, but the marriage did not appear in the proceedings, and she was treated as a *feme sole*. She afterwards, together with her husband, executed a conveyance to a purchaser, and the husband covenanted in the conveyance that they would levy a fine. A purchaser from the last purchaser objected to the title on the ground that no fine had been levied and that the proceedings were defective in not treating the woman as a married woman. It was held, however, that the matter was one of conveyance only, and not an objection to the title. Knight Bruce, V.C., said, "That a complete equitable title was obtained by the purchaser, it is impossible to doubt, and it is equally impossible to doubt that a complete legal title was obtained by him to one moiety of the estate, though not to the other moiety, by reason of the marriage. But I apprehend that the married devisee, under the orders of the Court which bind her, became absolutely a trustee for the purchaser, and was compellable to complete the legal title. That being so, I apprehend that the question was one not of title, but of conveyance."

(*m*) 1 Coll. 13.

So, a vendor, who has yet but an agreement for sale, but is in a position to compel his vendor to convey to him, shews a good title on shewing this, and it is perhaps not an objection to title, but a matter of conveyance only, that the legal estate is in a superior vendor (*n*).

The Devolution of Estates Act, by which the estate is vested in the personal representative, leaving a quasi-equitable estate only in the next of kin or devisee, raises the question whether the next of kin or devisee can make a good title without a conveyance from the personal representative, or whether it is a question of title only. The point was discussed in *Martin* v. *Magee* (*o*), but was not necessary for the decision of the case. Land was devised, and the devisee died before conveyance by the executors to her. She devised the land to her executors in trust for sale. They made a sale, and the purchaser required a conveyance from the executors of the first will. This was refused. It will be seen that whether it was a matter of title or of conveyance did not matter; as the refusal to give a proper conveyance entitled the purchaser to be freed from the contract equally as well as inability or refusal to make a good title.

Ferguson, J., thought that the matter was one of conveyance merely, and he was affirmed by the Divisional Court. In the Court of Appeal, Osler, J.A., was inclined to agree with the Court below that the question was one of conveyance merely, while Maclennan, J.A., was clearly of opinion that it was a question of title. The other Judges concurred in allowing the appeal without expressing their opinions in detail. That the matter is one of title seems to the writer, with all respect, clear. Where there is an outstanding legal estate held upon trust, either express or implied, no doubt the getting of it in for a purchaser is a mere matter of conveyance. But in such a case the trustee could not make a good title to a purchaser from himself. He could convey the legal estate but could not deal with

(*n*) *Robinson* v. *Harris*, 21 Ont. R. 43; 12 Occ. N. 155; 19 App. R. 134.
(*o*) 19 Ont. R. 705; 18 App. R. 384.

the equitable estate; and the grantee of the legal estate would hold the land upon the same trusts as his grantor. The case of a personal representative under the Act in question is entirely different. He not only holds the legal estate, but he has absolute power to sell and convey the equitable estate as well. True, the beneficiaries might restrain him in a proper case from selling. But he has the absolute power to sell to a purchaser who need not ask whether there are any debts or whether debts have been paid. Under such circumstances, it seems clear that the matter is one of title, not merely of conveyance. The abstract might shew that when the executors' functions had been performed the beneficiary could compel a conveyance. But, in every case, it would also show that another person, viz., the personal representative, was just as well able to make a good title to a purchaser as himself.

EDITORIAL REVIEW.

The Master in Chambers.

The death of the late Master in Chambers, Mr. R. G. Dalton, Q.C., after more than twenty years of faithful work, left vacant the office which has been filled by the appointment of Mr. John Winchester. Mr. Winchester's performance of his duties as official Referee during Mr. Dalton's absence on leave, gave the greatest satisfaction; and his appointment is therefore all the more welcome. We trust that he may long live to perform his important functions.

Judicial Salaries.

When Parliament was in session we referred to the resolution brought in by the Minister of Justice respecting judicial salaries. We pointed out that the proposed change would result in but a small increase for the present, with a liability to reduction upon the increase of work which is certain to come; and we expressed the fear that the plausible measure might pass.

After all Parliament was prorogued without action being taken. Whether the introduction of the resolution was merely for the purpose of quieting the agitation for an increase, or for the better purpose of exciting discussion as to the best mode of payment and drawing out opinion as to the amount, is not of course known. But certain it is that the subject cannot be dropped or compromised. The salaries were fixed years ago when the professional incomes were comparatively small and the volume of business was not large. They are totally inadequate at the present time considering the amount of work done, and are out of all proportion to the amount which a Barrister of first or even second rank can make at the Bar.

Police Magistrates.

The appointment of an assistant Police Magistrate in the city of Toronto is proposed. From all accounts it is not quite clear why an assistant is required, as the present Magistrate disposes of his work in an hour or two every day.

We refer to the matter, however, not for the purpose of discussing the necessity of appointing an assistant, but for the purpose of suggesting that if appointed he should have some qualification by training and education for the position. A great deal of the work has been done from time to time by Justices of the Peace, and it is rumoured that one of them will be appointed assistant. While it may answer to call upon a Justice once in a while to take the Bench in the absence of the magistrate, if a permanent appointment is to be made it is a matter of necessity that he should be a professional man. Police Magistrates have very large powers, and are a necessity in crowded centres. They try many cases which but a few years ago were tried at the assizes, and one would have been horrified at the suggestion that cases of the kind should be transferred from a Judge and jury to a layman. The smallest property rights are carefully and strictly confined to the disposition of a Judge who must have been a Barrister of at least five years' standing, and where a man's liberty is concerned the same care should be taken to see that he should not be subjected to the mercies of a man who may mean well but may not have the requisite knowledge to do well. What is the use of requiring the practice of the law to be confined to those who have complied with the stringent conditions imposed, if the highest functions, the judicial, are to be entrusted to unskilled persons? The Police Court occupies the position of a Criminal Court for the relief of the higher Courts and the speedy disposition of business, and it is essential in the public interests that a professional man should perform the duties of magistrate.

Women as Lawyers.

We referred to this subject before on the occasion of the passing of an Act to enable the Law Society to admit women to practise as solicitors. We also pointed out that the Legislature had misdescribed the Law Society in the Act; and, as the Act was probably drawn by or on behalf of the young woman on whose application it was passed, this was a bad beginning. Notwithstanding the misnomer of the Society, it appears that the Benchers have not taken advantage of it, but have considered the application again since the passing of the Act, and have exercised their discretion by declining to alter the rules so as to admit women.

There is still a wide field of practice open. The Division Courts Act permits "any person" to appear at the trial of any cause as agent or advocate for any party. But unfortunately the same expression occurs in the Act respecting Solicitors, which the Legislature has interpreted to mean only male persons. Does the Interpretation Act help her? "Person" there is said to include any body corporate or politic, or party. Women are not bodies corporate, but they are often politic bodies. They do not like to be called "parties"; but necessity is a stern mother, and may drive her wandering daughter to try advocacy in the Division Court, and there procure a final ruling on the matter. Then, there is a large body of uneducated gentlemen who do conveyancing, the qualifications for the business being a slender stock of blank forms and a gullible client. As feeders for the profession they have their uses; and the promise of many rectifications of conveyances given by the wrongly drafted Act is bright if the young woman in question enters into competition with the male conveyancers. There is therefore no need to despair.

Evidence in Provincial Offences.

In reviewing the legislation of the year, *ante*, p. 184, we referred to an amendment to the Evidence Act. By section 9 the defendant and the husband or wife of a defendant were made competent and compellable witnesses on

the trial of any proceeding under any Act of the Legislature, *not being a crime*. The italicised words were struck out by the amendment. And we remarked that no material change had been made; but that the amendment assumed that a trial under an Act of the Legislature might be in respect of a crime, *i.e.*, a provincial crime or offence.

While the conclusion as to the assumption of the amendment was right, it was wrong to say that no material change was made. We were not aware at the time of the case of *Regina* v. *Hart*, 20 Ont. R. 611, in which it was held that a provincial offence was to be treated as a crime for the purpose of the section, and that a conviction obtained by calling the defendant as a witness should be quashed. We assumed that a provincial offence could not in any sense be said to be a crime. However, as the decision of a Divisional Court was to the effect stated, the Legislature has thought fit to make its statutes operative by declining to call offences against its enactments crimes, and so securing the evidence of the persons charged with offences.

BOOK REVIEWS.

A Treatise on the Construction and Effect of Statute Law. With appendices containing words and expressions used in statutes which have been judicially or statutably construed, and the popular and short titles of certain statutes. By HENRY HARDCASTLE, of the Inner Temple, Barrister-at-Law. Second edition, revised and enlarged. By WILLIAM FEILDEN CRAIES, M.A., of the Inner Temple and Western Circuit, Barrister-at-Law. London: Stevens & Haynes, 1892.

A glance through the reports shows that a very great bulk of law depends upon the construction of the statutes. Acts are passed with such rapidity that it requires constant attention to keep pace with them, and superhuman efforts to state the general effect at any of the halting places. The construction and effect of statutes then has become a most important branch of jurisprudence, and the latest treatise is most welcome.

The book before us is well known and has established its reputation as a most useful book of reference. The authorities cited are very numerous and the arrangement methodical.

A most useful feature is the appendix of words and phrases, which have been judicially construed. While this branch of book-making has been taken up by Mr. Stroud in his Judicial Dictionary, the most modern is always the best glossary, because the work of construing is constantly going on.

A Concise Treatise on the Statute Law of Limitations of Actions. With an appendix of statutes, references to English, Irish, and American cases, and to the French Code, and a very full index. By HENRY THOMAS BANNING, M.A., of the Inner Temple, Barrister-at-Law. Second edition. Revised and enlarged. London: Stevens & Haynes, 1892.

The first edition of this book appeared in 1877, and in consequence of the early date more recent works have been more constantly referred to. A hurried perusal of parts of this edition shows that the law has been brought down to date by the citation of modern cases. If we might say so, we think that the learned author does not make sufficiently clear the distinction between the rights of independent trespassers *inter se*, and the right of the owner against them. They stand on different principles, but are treated as if there was a connection between them (pp. 112, 113).

Commentaries on Equity Jurisprudence. By Hon. Mr. Justice Story, LL.D., sometime one of the Justices of the Supreme Court of the United States. Second English Edition. By W. E. Grigsby, LL.D. (Lond.), B.C.L. (Oxon.), of Balliol College, and of the Inner Temple, Esquire, Barrister-at-Law, etc., etc. London: Stevens & Haynes, 1892.

The original purpose of this work was to amplify the text of Story, and show the development of Equity jurisprudence by English case law, on account of the tendency in modern American editions to adhere to the development along the line of American decisions. From frequent reference to the first edition, which the writer has constantly used, he can testify to the assistance it affords to the practitioner. And a glance through this edition discloses the addition of many valuable notes.

Anent the notes, while they must exist in law books, is there any necessity for a parallel treatise to be written in them? If necessary to distinguish the editor's from the author's work, it is easy to do so by means of inverted commas or brackets and yet make the text one harmonious whole. The learned editor thanks his critics whose hints he says he has taken advantage of. If the majority are in favour of short notes and longer text, we hope he will so arrange the next edition.

REVIEW OF EXCHANGES.

Law Journal.—16th January, 1892.

A Solicitor's Authority to Institute or Defend an Action. Cases are cited showing that in case of a disputed retainer the solicitor must prove it; and though it is not necessary that it should be in writing, it is dangerous not to have it so. The writing will be strictly construed, and must clearly state the authority for the particular services. A retainer to recover judgment will not authorize interpleader proceedings which are of the nature of a new action. For a defence less particularity is required.

The Law of Inebriety. Concluded in the following number. As to criminal responsibility the development of the law is traced from the theory of *voluntarius dæmon*, or aggravation theory, through the milder one of no mitigation, no aggravation, to the more modern one that if a man was in such a state of intoxication that he did not know the nature of the act or that it was wrongful he is insane in law. As to contract, a distinction was early drawn between complete and partial intoxication, the former rendering the contract void, the latter voidable. Later the theory was propounded that the contract of a totally intoxicated person was voidable.

Ibid.—30th January, 1892.

Brands. Some cases upon trade-marks are cited.

Ibid.—13th February, 1892.

Railway Unpunctuality. A number of cases on the liability of railway companies to passengers for unpunctuality in running their trains are cited. By notices given that they would not be liable for delay unless through wilful misconduct of their servants, and selling tickets on this condition, the companies were held to have contracted themselves out of liability. When liability does exist the damages must be limited to the expenditure which the passenger would naturally incur at his own cost if he had no company to look to. He cannot recover the expense of a special train.

Ibid.—20th February, 1892.

The Computation of Time in Criminal Cases. Some cases are cited as to whether when a time is limited the day of the act should be counted or excluded. In general it is included in the computation.

Ibid.—27th February, 1892.

Chapters in the Law of Life Insurance. Continued and concluded in eleven following numbers. The learned writer traces the law on the conflict of public policy with the contract of life insurance, as to the liability of the insurer when the insured dies by his own hand or by the hands of justice. He then treats of the restrictions on the insurance of children; insurable interest; lien on the policy money for premiums; insurance under the Married Women's Property Acts; the doctrine of warranty in applications for insurance; and the insurance of annuitants.

Ibid.—12th March, 1892.

The Decay of Legal Maxims. In early days when decisions were few and society comparatively simple in its elements, the condensation of principles into maxims was found convenient. But at present the search is more after single instances. Hence the decay of maxims.

Ibid.—19th March, 1892.

Statute of Frauds: Acceptance. A review of the wavering decisions as to what is acceptance. Cases are cited in which there has been actual rejection of goods after inspection though held to be acceptance within the Act. Reference is made to *Taylor* v. *Smith*, in which the statute is said to mean acceptance and not rejection.

Ibid.—26th March, 1892.

Constructive Notice Under The Conveyancing Act, 1882, Sec. 3. *In re Cousins*, 31 Ch. D. 671, is commented on as showing the alteration effected by the Act as to notice through a solicitor.

Ibid.—9th April, 1892.

Employment of Solicitors by Married Women. Costs can be recovered either by virtue of statute or contract. Divorce proceedings afford an illustration of the former. In the case of contract the wife may have authority to pledge her husband's credit for necessary services. Where neither of these grounds exists the liability must depend upon the possession of free separate estate.

Stockbrokers' Pledges of the Peoples' Securities. In continuation of a previous article the learned writer comments upon the decision that the pledge of a security by a stockbroker does not put the pledgee upon inquiry as to the ownership merely because the pledgor is a broker. The rule established is stated thus:—"A person taking a negotiable instrument in good faith and for value obtains a title valid against all the world."

Ibid.—30th April, 1892.

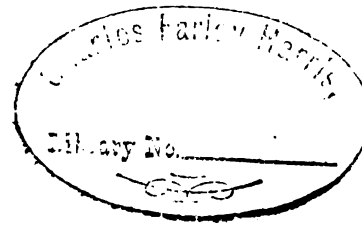
Implied Grant of Easement. It is said that the doctrine of implied grant is as applicable to a devise as to a grant. Some remarks are made as to the kinds of easements affected.

Ibid.—7th May, 1892.

Railways and Excursion Liabilities. Where crowding is occasioned by inviting the public to excursions, the railway companies must take means to protect them. But the doctrine of contributory negligence applies here as in other cases of negligence.

Ibid.—21st May, 1892.

Dismissal of Servant—Board, Wages. The older cases say that when a servant is dismissed with wages in advance in lieu of notice, compensation for loss of board and lodging is not due. One or two late cases contain *dicta*, however, from which it might be implied that such compensation should be given, unless contracted against.



THE CANADIAN LAW TIMES.

OCTOBER, 1892.

THE UNDERTAKING AS TO DAMAGES AS THE PRICE OF AN INJUNCTION.

EITHER the practice of granting injunctions has been largely extended of late, or else the increase of business has been such as to bring a larger proportionate number of injunction actions before the Courts. At any rate, we have to deal more extensively with injunctions than formerly, and a review of the responsibility which a plaintiff assumes in obtaining an interlocutory injunction may be of use.

Origin and history.—The origin and history of the undertaking as to damages was given by Sir George Jessel, M.R., in *Smith* v. *Day* (*a*); and though the dicta of that learned Judge in that case have been disapproved of, the history, which is, no doubt, correctly detailed, remains as interesting as ever. His Lordship said, "It was invented by Lord Justice Knight Bruce, when Vice-Chancellor, and was originally inserted only in *ex parte* orders for injunctions. Its object was, so to say, to protect the Court as well as the defendant from improper applications for injunctions. If the evidence in support of the application suppressed or misrepresented facts, the Court was enabled not only to punish the plaintiff but to compensate the defendant. By degrees the practice was extended to all

(*a*) L. R. 21 Ch. D. at p. 424.

cases of interlocutory injunction. The reason for this extension was, that though when the application was disposed of upon notice, there was not the same opportunity for concealment or misrepresentation, still, owing to the shortness of time allowed, it was often difficult for the defendant to get up his case properly, and as the evidence was taken by affidavit, and generally without cross-examination, it was impossible to be certain on which side the truth lay. The Court, therefore, required the undertaking in order that it might be able to do justice if it had been induced to grant the injunction by false statement or suppression. I am of opinion that the undertaking was not intended to apply where the injunction was wrongly granted, owing to the mistake of the Court, as, for instance, if the Judge was wrong in his law. I think this is shown by the fact that such an undertaking is never inserted in a final order for an injunction."

Lord Justice Cotton, on the other hand, did not agree with the reasons given by the Master of the Rolls. He said, "The Master of the Rolls has gone into the history of undertakings as to damages on the granting of interlocutory injunctions, and has limited their operation in a way with which I am not at present prepared to agree." After referring to the expression of opinion just quoted, he proceded, "It would require a great deal of argument to convince me that this view is correct. . . . I cannot, as at present advised, agree that the jurisdiction to give damages is limited to cases where there has been default on the part of the plaintiff. It is alleged that the fact that an undertaking is never inserted in injunctions granted at the hearing shews that it is only inserted with a view to the party obtaining the injunction having been guilty of default. It appears to me that this is not so, and that the true reason of the difference is that when an interlocutory injunction is granted the Court does not decide any right, but only determines on what footing matters shall stand till the trial; but at the trial the rights of the parties are finally determined."

While the history of the undertaking, as given by Sir George Jessel, is strictly correct, in that it was at first inserted only in *ex parte* orders, and subsequently in all interlocutory injunction orders, the reason given by him for its insertion cannot be accepted as the true one. In *Wakefield* v. *Duke of Buccleugh* (*b*), the defendant agreed to submit to an interlocutory injunction on the plaintiff's undertaking as to damages. The plaintiff alleged that he had made out a strong case, and should not be asked for an undertaking. But Kindersley, V.C., said that the undertaking was given in all cases; that it was a reasonable rule to require it, and it assisted the Judge in withholding any expression of opinion till the hearing. The Court, so to speak, undertakes to say nothing more as to the rights of the parties than that matters shall remain in *statu quo* until the trial; but the plaintiff can have that order only upon the undertaking, for the reason that no rights are determined.

In *Tuck* v. *Silver* (*bb*) an injunction was asked for, on notice, to restrain the infringement of a patent, and Wood, V.C., was of opinion that it should be granted, but if the plaintiff objected to give an undertaking he would hear him in reply. Counsel then argued that the conduct of the defendant was such as to disentitle him to the undertaking; that the practice was of recent origin to require it in any but *ex parte* orders, and the defendant had lost any claim to indulgence. The Vice-Chancellor said, "It is quite true, as it has been put in the argument, that the practice of requiring an undertaking to be given by the plaintiff when obtaining an interim injunction to restrain the alleged infringement of a patent is of comparatively modern origin, where the motion is not made *ex parte*; but I have myself seen the great importance of insisting upon it in several recent cases. * * The circumstance of my being of opinion that this is a clear case for an injunction will not prevent my requiring the plaintiff to give the undertaking in question." In a note

(*b*) 13 W. R. 856. (*bb*) Johns. 218.

to this report it is stated that in a case of *Ingram* v. *Stiff*, the Vice-Chancellor said it was not to be inferred from *Tuck* v. *Silver* that the undertaking would be required in a clear case of fraud on the part of the defendant, and, the evidence showing that, an injunction was granted without an undertaking. But the fraud would have to be made out conclusively; to convict the defendant of fraud on an interim motion and without trial would require very strong evidence.

Form of the undertaking and mode of giving it.—The form of the undertaking settled by long usage is as follows:—"And the plaintiff by his counsel undertaking to abide by any order as to damages which this Court may make, in case it shall hereafter appear that the defendant has sustained any, by reason of this injunction, which the plaintiff ought to pay."

The undertaking is, in the Province of Ontario, as a rule, given verbally by counsel for the plaintiff. If the plaintiff is a foreigner, some responsible person may be ordered to be joined as plaintiff to give the undertaking. In England, it appears to have been the practice to sign an undertaking in the Registrar's book; and in *Pacific Steam Co.* v. *Gibb* (*c*), there being no officers of the plaintiffs in London, it would have been inconvenient to sign the book, and an undertaking was allowed to be given on a separate paper and transmitted to the Registrar.

In *Anglo-Danubian Co.* v. *Rogerson* (*d*), an undertaking by a limited company was said to be insufficient. The learned Judge said that such a company was in a position analogous to a foreign plaintiff, and an *ex parte* order was continued only upon the terms of procuring an undertaking by a responsible person.

Defendant's right to inquiry.—In *Smith* v. *Day*, it was held that the Court was not bound to grant an inquiry as to damages, but had a discretion to refuse an inquiry. The cases in which the Court might exercise its discretion

(*c*) 14 W. R. 818. (*d*) 10 Jur. N. S. 87.

in refusing a reference are detailed by the Master of the Rolls in the case already cited. First, where an injunction is dissolved for delay or some cause which disentitles the plaintiff to an interlocutory injunction, though not to relief at the trial, and then at the trial a perpetual injunction is granted. Secondly, if the damage be trifling or remote. Thirdly, if the defendant has been guilty of delay in applying, though no precise limit is fixed for making his application.

The first head has not, as far as the writer knows, received consideration. The third case will be dealt with under the head of the time for applying for a reference. As to the second, the amount of damage has not been made an element in the determination of the right to an inquiry. The weight of authority is in favour of granting the inquiry at the defendant's risk.

In *Griffith* v. *Blake* (*f*), Baggallay, Cotton and Lindley, LL.J., took occasion to express their disagreement with Sir George Jessel's *dicta* in *Smith* v. *Day*. The first learned Judge said, "I cannot concur in the opinion expressed by the late Master of the Rolls in *Smith* v. *Day*." Cotton, L.J., said, "I am of opinion that his *dictum* is not well founded, and that the rule is, that whenever the undertaking is given, and the plaintiff ultimately fails on the merits, an inquiry as to damages will be granted unless there are special circumstances to the contrary." And Lindley, L.J.: "The *dictum* of the late Master of the Rolls is not consistent with what was done by the Court of Appeal in *Novello* v. *James* and *Newby* v. *Harrison*." *Smith* v. *Day*, then, may be taken to be overruled as to the *dictum* of the late Master of the Rolls and the matter is left open for consideration upon the other authorities.

From an early date until the present time the right of the defendant to an inquiry has been maintained, with one exception, that of *Smith* v. *Day*, overruled. In *Newby* v. *Harrison* (*g*), an injunction was granted, on the usual undertaking, restraining the defendants from taking ice from

(*f*) L. R. 27 Ch. D. 474. (*g*) 3 D. F. & J. 287.

a canal. The bill was dismissed with costs on the ground that the plaintiff had not established any such exclusive right to the ice as to entitle him to interfere with its abstraction by the defendants, and Vice-Chancellor Wood was inclined to treat the defendants as trespassers. After dismissal of the bill a motion for an inquiry was made, and refused on the ground that no jurisdiction existed to make such an order after dismissal of the bill. On appeal to the Lords Justices, they held that the right was not lost by reason of the dismissal. It was then contended that no inquiry should be directed, because the defendants in taking the ice were mere trespassers; and although the plaintiff had no right to interfere, still damages ought not to be granted because he prevented them from doing that which they had no right to do. Notwithstanding this, an inquiry was directed to ascertain whether in respect of such ice, if any, as the defendants were as between them and the plaintiff entitled to take, any and what damages were occasioned to the defendants by reason of the order.

In *Novello* v. *James* (*h*), the plaintiff, claiming a copyright, obtained an injunction to restrain the defendant from an alleged infringement of it. The usual undertaking was given. The law was, pending this suit, settled in another case adversely to the plaintiff, and the injunction was dissolved. Vice-Chancellor Stuart, on a subsequent motion made for a reference as to damages, refused it on the ground that the measure of damages was the costs of the suit. On appeal to the Lords Justices, Knight Bruce, L.J., said: "It would, I conceive, be unjust to the defendant to disregard or not to give effect to the undertaking which was the price at which the plaintiff accepted the continuance of the injunction, instead of accepting or proposing that the defendant should be unrestrained and keep an account until the hearing or further order. Upon the present motion, if his Honour the Vice-Chancellor had had before him all the elements and materials necessary and obtainable for the purpose of enabling an opinion to be formed as to the

(*h*) 5 D. M. & G. 676.

amount of damage sustained by the defendant in consequence of the injunction, I should have felt even more reluctance than the great reluctance which I do feel against permitting a continuance or prolongation of this unlucky litigation. But I think that his Honour had not, and, however unwillingly, I must, I fear, say that the defendant has a right to insist on having ascertained, either by an officer of the Court of Chancery, subject of course to appeal, or by a jury, what, if any, is the *quantum* of damage that he has suffered." Turner, L.J., gave judgment to the same effect, saying that as the Court had no material on which to form an opinion as to the amount of damages, the defendant was entitled to an inquiry.

In *Graham* v. *Campbell* (*i*), a solicitor was employed to sell a reversionary interest in stock; and entered into negotiations with two competing purchasers. A bargain was finally concluded with one, and the other, the plaintiff, brought an action to restrain dealing with the stock and for specific performance of an alleged agreement entered into with him to sell to him. An injunction was granted on the usual undertaking, and afterwards the action was dismissed, and a reference as to damages refused. On appeal, James, L.J., in delivering the judgment of the Court of Appeal, said, "The undertaking as to damages which ought to be given on every interlocutory injunction is one to which (unless under special circumstances) effect ought to be given. If any damage has been occasioned by an interlocutory injunction, which, on the hearing, is found to have been wrongly asked for, justice requires that such damage should fall on the voluntary litigant who fails, not on the litigant who has been without just cause made so." If the Court had not been able to ascertain the damages without an inquiry, they would have referred it; but as the measure of damages was interest on the purchase money for the time during which the defendant had been kept out of his purchase money, less any interest he might have made, the Court granted an order therefor without a reference.

(*i* L. R. 7 Ch. D. 490.

In *Newcomen* v. *Coulson* (*j*), the plaintiff discontinued after obtaining an injunction, on an undertaking, to restrain the defendant from building a bridge. A reference was granted in the ordinary way, no question being raised as to the right.

In *Griffith* v. *Blake* (*k*), the question came up for discussion at a rather early stage of the proceedings. On a motion for an injunction to restrain the carrying on of a business that occasioned a nuisance to the plaintiffs, it appeared that there was such a noise created by the defendants as to amount to a nuisance to the plaintiffs. The defendants had given a notice to quit which would expire in the course of a few weeks. An injunction was granted on an undertaking. The defendants declined to give an undertaking not to carry on their business so as to be a nuisance to the plaintiff. Baggallay, L.J., said, "This injunction was obtained by the plaintiffs on the usual undertaking as to damages, and if it turns out that the injunction ought not to have been granted, the defendants will get full compensation by means of the undertaking for the temporary damage they will have sustained." After referring to *Smith* v. *Day*, and expressing his dissent, his Lordship proceeds, "If the defendants turn out to be right, it appears to me that they can, under the undertaking, obtain compensation for all injury sustained by them from the granting of the injunction." And Cotton, L.J.: "No doubt the Court is reluctant to interfere summarily with a business which is being carried on and intended to be carried on, but here the defendants are leaving in three weeks, so that their business will only be interfered with for a short period, and if they turn out to be in the right they will get compensation under the undertaking as to damages. . . . The rule is that whenever the undertaking is given, and the plaintiff ultimately fails on the merits, an inquiry as to damages will be granted unless there are special circumstances to the contrary." And to the same effect is the judgment of Lindley, L.J.

(*j*) L. R. 7 Ch. D. 764. (*k*) L. R. 27 Ch. D. 474.

Again, in *Hunt* v. *Hunt* (*l*), there are very strong expressions of opinion as to the absolute right of a defendant to the inquiry unless the damages are altogether too remote. In that case a wife, living apart from her husband under a separation deed, applied for an injunction to restrain the defendant, her husband, from taking their children with him out of the jurisdiction of the Court. He was an army surgeon, and was about to sail for Egypt on foreign service, taking with him in the troop-ship the children and their governess, all of whom would thus have travelled free. In consequence of the injunction he remained in England, and was put to the expense of residing in London; he lost free passage for his children and their governess; and his pay was stopped. Pearson, J., granted the injunction on the usual undertaking, but his order was reversed by the Court of Appeal, that Court being of opinion, contrary to that expressed by Pearson, J., that the separation did not entitle the plaintiff to the injunction. The motion having been treated as a trial of the action, it was dismissed with costs. On an application for a reference as to damages, it was argued for the plaintiff that, as the matter turned on a point of law, the plaintiff ought not to be responsible for a mistake of the Court; that the Court had a discretion to grant or refuse the inquiry, and it ought to be refused; that a husband could not sue his wife in tort, and the application was equivalent to an action and should not be entertained. Pearson, J., disposed of the point that the mistake in law did not entitle the defendant to damages by reference to the overruling of *Smith* v. *Day*, which bound him. As to the question of discretion, he said, "What is that discretion? The discretion, to my mind, is well pointed out by the present Master of the Rolls in the case of *Smith* v. *Day*, in which he says that you must take into consideration what the damages are, and that if the damages are of such a nature that if it were a case of suing on a contract they would be too remote, then they are not damages which the Court on such an undertaking ought to allow." He then mentions

(*l*) 54 L. J. Ch. 289.

the items of damage claimed, and holds that they must have been in the contemplation of the plaintiff when the injunction was obtained.

In *Tucker* v. *New Brunswick Trading Co.* (*m*), an injunction was granted against the defendant company, on the usual undertaking as to damages. Counsel for another defendant asked for the undertaking as well, and counsel for the plaintiff gave it. It was not inserted in the order as to this defendant, and a motion was made to extend the undertaking as to both this defendant and another who had not asked for it. As to the latter the motion failed. But the order was varied as to the former. In discussing the right to the undertaking and the nature of it, Cotton, L.J., said, "If a defendant applies for an undertaking, the plaintiff may decline to take any order. The Court only makes the undertaking a condition of granting an injunction; if the plaintiff refuses to give it the Court can refuse the injunction, but it cannot compel the plaintiff to give an undertaking." And Lindley, L.J., said, "An undertaking is the price of an injunction, and if a man gets an injunction he must pay the price."

If the defendant does not ask for the undertaking when the injunction is asked for and granted, the Court cannot compel the plaintiff afterwards to give the undertaking. But in a case of that kind, where the omission appeared to have arisen from a mistake, the Court, on the application of the defendant, stayed the issue of the injunction order for ten days to enable the defendant to move to restrain the plaintiff from doing anything detrimental in the premises (*n*).

A somewhat remarkable case was *Neath Canal Co.* v. *Ynisarwed Colliery Co.* (*o*). There the defendants had in a former action submitted to an injunction restraining them from trespassing on the plaintiff's property. On a repetition of the offence this action was brought, and an interlocutory injunction asked for. It was granted only

(*m*) L. R. 44 Ch. D. 249. (*n*) *Hendrie* v. *Beatty*, 29 Gr. 423.
(*o*) L. R. 10 Ch. 450.

upon the usual terms of giving an undertaking as to damages. And in *Chappell* v. *Davidson* (*p*), an action for alleged infringement of a copyright, the Court, while saying that it was impossible to express any approbation of the course which the defendants had pursued, nevertheless granted an injunction against them only upon the usual undertaking. Knight Bruce, L.J., observed that it lay on the plaintiff to show that it ought not to be required.

Special circumstances disentitling defendant to a reference.—We have seen that by a long course of practice the defendant has become entitled to the undertaking as a matter of right; it is the price which the plaintiff pays for the order, and he must show some good reason for not being required to give it. We have also seen that the plaintiff must give it, even though he has previously established his right, or rather though the defendant has submitted to it, as in *Neath Canal Co.* v. *Ynisarwed Colliery Co.*; and that the defendant is entitled to it, even though his conduct may not meet with the approbation of the Court, as in *Chappell* v. *Davidson*. It is, therefore, somewhat surprising to find that having required the undertaking the Courts have, in some cases, refused the defendant a reference to ascertain the amount of damages, if any. The right to the undertaking is established at the time when it is given, as the cases cited shew. But the right has, as we shall see, been denied when the inquiry was asked for.

In *Hessin* v. *Coppin* (*q*), it was distinctly said by Blake, V.C., that it was not a matter of course to give the defendant damages where the injunction is not continued, or is dissolved. And his Lordship cited *Bingley* v. *Marshall* (*r*), and *Featherstone* v. *Smith* (*s*). And as he considered the conduct of the defendant not to be meritorious, he refused any inquiry as to the amount of damages.

In *Featherstone* v. *Smith*, however, the plaintiff obtained an injunction to restrain the defendant from selling timber

(*p*) 8 D. G. & M. 1.
(*q*) 21 Gr. 253.
(*r*) 11 W. R. 1018.
(*s*) 20 Gr. 474.

limits, and pending the *ex parte* order (which was not continued) the limits rose in value. The plaintiff having dismissed his bill, a motion was made for a reference to ascertain the amount of damage, but was refused on the ground that the defendant was premature in coming to the Court, inasmuch as it was not certain that he would eventually sustain any damage, as the market was rising. The right to the inquiry was recognized, but the absence of damages at the time of the motion was an objection to it.

In *Bingley* v. *Marshall* (*t*), the plaintiff asked for specific performance of an agreement to grant a lease, and his bill was dismissed without costs. A motion for a reference as to damages was dismissed, though the defendant showed that he had been unable to lease the house and had lost the rent through the injunction. Wood, V.C., in referring to the application for damages, said that "the undertaking as to damages was only enforced, (1) when the plaintiff applied *ex parte*, and (2) when, at the hearing of the motion, the case was doubtful, and the injunction was only granted until the hearing upon the terms of giving an undertaking as to damages"; and said that there was some foundation for the institution of the proceedings, and the present application was an attempt to extend the jurisdiction of the Court in a manner it was never intended as to these undertakings. It would be monstrous, he said, to make the plaintiff bear all the costs and damages incident to a litigation which the Court thought he was right in instituting, though he had not succeeded. We have seen, however, that the practice of requiring the undertaking has, since this decision, been largely extended, and that the error of the Court in granting the injunction does not absolve the plaintiff from his liability. The reporter adds in the head-note to this case that the Court would not grant an inquiry as the loss had arisen from the litigation, not from the injunction; but there is nothing in the judgment to warrant this.

And where the defendant, by becoming the purchaser of a business from his co-defendant, who made the convey-

(*t*) 11 W. R. 1018.

ance to defeat creditors, had awakened the suspicion of creditors, and so provoked inquiry, a reference to ascertain the damages occasioned by an injunction to restrain him from dealing with the property pending the action was refused (*u*).

To whom undertaking extends.—The undertaking when given is not confined to the defendant restrained, but applies to all defendants though one or more only is or are restrained (*v*). But every defendant desiring the benefit of the undertaking must ask for it at the time of granting the injunction, otherwise it cannot be imposed upon the plaintiff.

Discontinuance.—The jurisdiction to grant an order to ascertain the damages is not gone by the plaintiff's discontinuing his action, but the defendant may still apply if he applies promptly (*w*).

The relation of the undertaking to costs.—In one or two instances the right to damages has been confused with the right to costs. In *Novello* v. *James* (*x*), Stuart V.C., in dismissing the plaintiff's bill (filed to restrain the alleged infringement of a copyright) decided that the proper damages would be the costs of the suit. On appeal to the Lords Justices, however, this ruling was reversed. Turner, L.J., said, "I think that this question of damage is a separate matter entirely from the question of the costs of the suit, and I very much doubt whether the question of costs ought to have been mixed up with the question of the amount of damages sustained by the defendant."

And again, in *Graham* v. *Campbell* (*y*), James, L.J., in delivering the judgment of the Court of Appeal, said, "the inquiry as to damages is a matter wholly collateral" to the question of costs. But in *Gault* v. *Murray*, it was thought by the trial judge and also by a Divisional Court that the Court might give the defendant damages and refuse him

(*u*) *Gault* v. *Murray*, 21 Ont. R. 458.
(*v*) *Tucker* v. *New Brunswick Trading Co.*, L. R. 44 Ch. D. 249.
(*w*) *Newcomen* v. *Coulson*, L. R. 7 Ch. D. 746.
(*x*) 5 D. M. & G. 876.
(*y*) L. R. 7 Ch. D. at p. 494.

costs, or in the alternative allow him his costs on condition of his not getting damages.

It is difficult to see how the two matters can be related. The costs are given to indemnify the defendant for what he has to pay his solicitor, and he may recover them on dismissal of the action without any undertaking, and the solicitor himself has besides a very substantial property in the costs. The undertaking is specially given to cover what the defendant would not get but for the undertaking, and must necessarily relate to some damage extra. And the fact that an injunction may be dissolved before the trial, and consequently before the costs are disposed of, shews that the inquiry must be altogether apart from the question of costs.

Married women.—A married woman may be required to enter into the undertaking with respect to her separate estate. It was so held in *Holden* v. *Waterlow* (*z*) where the suit was brought by a married woman respecting her separate property. But in the late case of *Hunt* v. *Hunt*, to which we have already referred, the undertaking seems to have been in the same general terms as in ordinary cases. On a motion for a reference as to damages, it was argued that it should not be granted, because it was in the nature of an action of tort by the husband (defendant) against his wife (plaintiff), and such an action would not lie. But Pearson, J., pointed out that it was in no sense analogous to an action of tort, and added, "I must say that in the present state of things, in which, under the Married Women's Property Act, a married woman is now at liberty to sue in her own name, which she could not do formerly, when there is no longer the presence of a next friend responsible for costs and damages, who in this case would have been compelled to enter into the undertaking on obtaining the injunction, I think I should be doing wrong and defeating the object of the provisions made under the Married Women's Property Act, and I should be enabling married women to throw on other parties a very

(*z*) 15 W. R. 139.

large amount of costs if I were to treat the married woman in the present case as being in any different position from that in which her next friend would have been if the next friend had given the undertaking."

Mode of inquiry.—The inquiry is usually made by a reference to the Master to ascertain the damages; but it may be directed to be tried before a jury (*a*).

Time for applying.—If the action is dismissed after a trial, it appears that the defendant ought to move promptly. In *Newby* v. *Harrison* (*b*), an appeal from a dismissal of the bill was dismissed on the 6th March, 1861, and the defendants moved on 10th July, 1861. In *Novello* v. *James* (*c*), the rights of the parties were determined in another suit on 1st August, 1854. Shortly afterwards an application was made and granted to dissolve the injunction in this suit; and afterwards, on 15th November, the motion for a reference as to damages was made.

In *Newcomen* v. *Coulson* (*d*), Malins, V.C., referring to *Newby* v. *Harrison*, said that as damages were not asked for on the dismissal of the bill, he would not have given them afterwards; and in the case before him, where the plaintiff had discontinued, he said that if it had gone to a hearing the proper time for applying would have been at the hearing, otherwise the right would have been waived. But where the plaintiff discontinued he thought that perhaps a year might not be considered too long a delay. In that case there was a delay of eleven months.

In *Smith* v. *Day* (*e*) Jessel, M.R., thought that the application ought to be made at the trial, if the result was favourable to the defendant. Brett, L.J., said, "As regards the time when the application ought to be made, I do not think that we ought to lay down that it must be made at the time when the injunction is dissolved; I do not think that the applicant necessarily is to be allowed to postpone

(*a*) *Novello* v. *James*, 5 M. & G. at p. 879.
(*b*) 3 D. F. & J. 287.
(*c*) 5 M. & G. 876.
(*d*) L. R. 7 Ch. D. 764.
(*e*) L. R. 21 Ch. D. 421.

it till the trial, nor do I say that he never can successfully make the application after the trial. I think that he ought to make it within a reasonable time after the dissolution of the injunction, and that what is a reasonable time depends upon the circumstances of the case." His Lordship thought that the delay in that case was too great. The injunction was dissolved in February, 1880; the action dismissed in June, 1881; and the motion made in February, 1882. Cotton, L.J., thought it advisable that the application should be made either when the injunction was dissolved, or at the trial, and that no express rule as to the limit of time should be laid down.

EDITORIAL REVIEW.

The Late Sir William J. Ritchie.

The second of the Chief Justices of the Supreme Court of Canada, Sir William Johnstone Ritchie, has died, after a long period of service on the Bench of his Province and that of the Supreme Court of Canada. The deceased Judge was a man of great cultivation and broad views, and will be greatly missed from the Court.

Upon taking his seat on the Bench at Osgoode Hall, on the day after Sir Wm. Ritchie's death, the Chancellor of Ontario, who is also President of the High Court of Justice, addressed the members of the Bar who were present as follows:

"I suppose, Dr. Hoskin, that you and the rest of the Bar are informed of the death of Sir William Ritchie, Chief Justice of the Supreme Court of Canada. At his advanced age, his death is not a matter of surprise, but it one of deep regret. It is not my intention to postpone the present sitting out of respect for his memory. It has not been the English practice in recent years to do so; and surely it is no disrespect to the memory of a great judge to carry on the work of the Court, where he in his lifetime set such an example of diligence in similar work. But it would not be fitting for me to take my seat here without referring briefly to the loss of so eminent a man. His death, indeed, was not a matter of surprise, except in the sense that death when it comes is always a surprise. Death in this case has created a vacancy which cannot readily be filled. To some, of course, he was a mere name;

to others he was known but slightly, there not being the same opportunity for knowing him personally as in the case of the Judges of this Province; but to all he was known through the reports of the Supreme Court and the reports of the courts of his own Province, and in these he has left a very distinguished record. He had a long judicial life on the Bench of his own Province and of the Supreme Court of Canada. The later reports do not do him justice; in recent years his powers may not have been so vigorous, but there are many cases, especially in constitutional law, in which he has written most able judgments which will not be forgotten. He was a notable man, and leaves a gap in the ranks of the judiciary which will not easily be stopped up."

Dr. Hoskin, Q.C., on behalf of the Bar, said:

My Lord,—On behalf of the Bar of this Province, I beg to say that we think it eminently appropriate that your Lordship should pass, as in eloquent terms your Lordship has done, a tribute to the memory of the distinguished jurist who has so recently passed away, one who has occupied the highest position in the judiciary. We, who are interested in the administration of justice, feel that the country has lost the services of an eminent man, and, while lamenting his loss, consider it to be our privilege, as well as our duty, to express in open Court our sense of the services he rendered to the Dominion."

At the opening of the Supreme Court of Canada, no reference was made to the death of the Chief Justice, according to the custom of that Court. While one can understand that an adjournment, even of a day, would cause great inconvenience to members of the Bar who had come from a distance, one cannot see the necessity or advantage of an entire absence of courteous reference to a deceased Judge of the Court.

The following letter was addressed to Lady Ritchie by the Justices of the Court:

"The Judges of the Supreme Court of Canada, at their first sitting since the decease of the great man who so long

presided over the Court, while they have deemed it proper not to deviate from the rule which he himself laid down, and which was observed on the occasion of the death of Sir William B. Richards and of Mr. Justice Henry, by publicly addressing any observations to the members of the Bar and others attending the Court, desire to express to you their sense of the loss sustained by the Court, which for the long period of seventeen years enjoyed the benefit of the extensive learning, the untiring industry, and the large judicial experience of Sir William Johnstone Ritchie, and their personal deep regret at the event which deprives them of an esteemed friend and a courteous, dignified, and efficient chief, and to convey to you and the family of the late Chief Justice of Canada their warm sympathy in your bereavement.

"S. H. STRONG.
"T. FOURNIER.
"H. E. TASCHEREAU.
"JOHN W. GWYNNE.
"C. S. PATTERSON.

"Supreme Court, October 4, 1892."

The Crown in Canada.

One of the most important constitutional cases decided by the Judicial Committee of the Privy Council is *The Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*, 8 T. L. R. 677. It settles at one stroke that the band may play the National Anthem when a Lieutenant-Governor enters a concert room, and that His Honour may, on the advice of his council (or, perhaps, without it in Quebec, Manitoba, and the North-West Territories, where Lieutenant-Governors are a real power), appoint Her Majesty's Counsel.

The case itself involved the question of the prerogative right of the Crown to be paid in full by the liquidators of the Maritime Bank before other creditors received anything. The debt by the Bank was to the Provincial Government, the point was at once raised as to whether the Lieutenant-Governor represented Her Majesty so as to claim

for the Province the prerogative right. And the Committee discussed somewhat at large the position of the Lieutenant-Governors.

The argument against the existence of the right is thus put by Lord Watson :—"The appellants did not impeach the authority of those cases, and they also conceded that until the passing of the British North America Act, 1867, there was precisely the same relation between the Crown and the Province which now subsisted between the Crown and the Dominion; but they maintained that the effect of the statute had been to sever all connection between the Crown and the Province, to make the Government of the Dominion the only Government of Her Majesty in North America, and to reduce the Provinces to the rank of independent municipal institutions." After pointing out that it had already been decided that the Provincial Legislatures are independent of the Parliament of Canada, that their functions are as high as those of the Imperial Parliament when acting within their proper spheres, and that the executive and legislative functions are distributed amongst the Dominion and Provincial authorities, his Lordship went on to say, "The appellants mainly, if not wholly, relied upon the fact that, whenever the Governor-General was directly appointed by the Queen, the Lieutenant-Governor of a Province was appointed, not by Her Majesty, but by the Governor-General, who had also the power of dismissal. If the Act had not committed to the Governor-General the power of appointing and removing Lieutenant-Governors, there would have been no room for the argument which, if pushed to its logical conclusion, would prove that the Governor-General, and not the Queen, whose viceroy he is, became the sovereign authority of the Province whenever the Act of 1867 came into operation. But the argument ignored the fact that, by section 58, the appointment of a Provincial Governor was made by the 'Governor-General in Council by instrument under the Great Seal of Canada,' or, in other words, by the Executive Government of the Dominion, which is, by section 9, expressly declared 'to continue and be vested in the Queen.' There was no

constitutional anomaly in an executive officer of the Crown receiving his appointment at the hands of a governing body who had no powers and no functions except as representatives of the Crown. The act of the Governor-General and his Council in making the appointment was, within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor when appointed was as much the representative of Her Majesty for all purposes of Provincial Government as the Governor-General himself was for all purposes of Dominion government."

This judgment, affirming, as it does, the judgment of the Supreme Court of Canada which affirmed the decision of the Supreme Court of New Brunswick, finally settles the debate as to whether or not the Lieutenant-Governor represents Her Majesty.

The Solicitor to the Treasury.

The recent Act of the Legislature of Ontario, which provides for a succession tax, has necessitated the appointment of a Solicitor to the Treasury for the purpose of seeing that the tax is duly paid. Mr. Alfred McDougall has been appointed to the office.

The Secretary of the Law Society.

Mr. Herbert Macbeth has been appointed Secretary to the Law Society of Upper Canada, in the place of the late Mr. Esten.

A Century of Legislation.

Just one hundred years ago in this month the first Legislature of Upper Canada assembled, and on the fifteenth day of the month passed its first statute, by which, in all matters of controversy relative to property and civil rights, resort was to be had to the laws of England as the rule for the decision of the same.

On the same day trial by jury was established in civil matters, and provision made for the recovery of small debts. The Province was divided into districts, and court houses and gaols were directed to be built.

A thorough review of our legislation for the past hundred years would be too lengthy; but a rapid glance back over the striking landmarks shows a marked advance in remedial legislation. We have largely drawn upon English statutes and have taken advantage of American models where they were more suited to our requirements.

Our land laws, based as they are upon the English law, depend largely upon transcripts of English statutes. But with regard to the transfer of land, beginning with a crude system of registration, we have, rapidly in later years, developed a system which combines perfect freedom of contract with an almost absolutely safe method of securing priority, aided largely by the adoption of short forms of precedents in conveyancing.

The Criminal law has followed the English, and in this year we have enacted the English Criminal Code.

In public affairs, our municipal institutions have a law which has developed along the line of experience, and though not by any means perfect, is workable to such an extent that it is generally understood by those who take an interest in municipal politics. Our school laws passed at a very early date have proceeded on the same lines; and have produced a system which compares most favourably with any other system.

In procedure, the Common Law Procedure Act marks an era. The Administration of Justice Act was a distinct independent advance, and to a great extent anticipated what was afterwards more fully accomplished by the Judicature Act.

Besides these great legislative advances, many minor and more specialized enactments indicate progressive, and, it must be said, sometimes too active legislation.

REVIEW OF EXCHANGES.

American Law Review.—May-June, 1892.

Should Appellate Courts review the facts? by J. E. RIDDICK. The learned writer concludes as follows:—"1. That Appellate Courts should not review the facts in actions at law. 2. That, when practical to do so, the findings of the *nisi prius* court or agreed statement of facts, when parties agreed on the facts, should be published in full with the report of the case."

Corporate organization by citizens of one State in another State to do business at home, by ARTHUR M. ALGER. Some remarks upon the practice of citizens of one State procuring incorporation in another State to carry on business in the home State. The learned writer says, "It would, therefore, seem to be the true doctrine that in the absence of a legislative declaration of policy, under the law of comity which prevails between the States, a corporation of one State, not forbidden by the law of its being, should be permitted to exercise within another State the general powers conferred by its charter whether its members are or are not citizens of the latter State."

The Status of American Married Women abroad, by ROBERT SEWELL. The learned writer shows that an American woman by marrying an alien does not cease to be an American citizen, although she may remove with her husband to his domicile and become there a subject of his sovereign. Her original rights slumber during the coverture, and revive when she becomes discovert.

The Liability of Public Corporations for the Infringement of Patents, by V. H. LOCKWOOD. The learned writer thus states the law:—"All public corporations, whether municipal or quasi, are liable for the infringement of a patent, excepting a State where the injured party is not a citizen thereof." American cases are cited.

Scientific Books in Evidence, by JOHN HENRY WIGMORE. A strong plea for the admission of scientific books in evidence instead of the sworn testimony of expert witnesses.

Ibid.--July-August, 1892.

The Deed of an Infant, by THOMAS R. HARRIS. After an exhaustive review of English and American cases, the learned writer concludes, "Whatever may be said of the effect of a deed of an infant, it is not voidable in the sense that a deed tainted with fraud in the inducement is voidable, and if there is any other meaning to be attached to the word, the authorities have not been successful in explaining what it is. The deed may indeed be rendered effectual against the infant by estoppel after age, but it may well be doubted whether it confers such title as is good against a stranger, or any other right or protection whatsoever. It seems impossible to escape the conclusion that the Courts have unconsciously, step by step, returned to the doctrine of the common law, that the deed of an infant where title passes by deed, is void, while professing an outward and merely nominal allegiance to the doctrine that it is voidable merely, perhaps out of deference to so great a name as that of Lord Mansfield."

The Legislature and the Streets, by FRANK J. GOODNOW. An examination of the constitutional jurisdiction over streets.

The Status of Indigent Americans in French Courts, by D. CHAUNCEY BREWER. It appears to the learned writer that they may have the same assistance as a native born, foreigners not being excluded by non-mention.

Jurisdiction and Practice of the Federal Courts of Appeal, by WM. L. MURFREE, Jr.

Criminal Law Magazine.—March, 1892.

Argument of Counsel. Some appropriate remarks upon the duty of Counsel to aid the Court in ascertaining or discovering the truth, and not to seek to win at any cost. American authorities are cited to show how Counsel may transgress and what the remedy is.

The Presumption of Innocence in practice. A comparison between the Common and the Civil Law, largely in favour of the latter, except as to the mode of conducting the trial.

Notes on Criminal Practice, by E. CLINTON RHOADS. American authorities are cited.

Ibid.—May, 1892.

Court and Jury in Prosecutions for Libels. American cases are cited on Privilege; Malice; Negligence; Style, etc., of publication.

Medical Jurisprudence, the Bar and the Judiciary, by CLARK BELL. A paper read before the New York State Bar Association.

THE

CANADIAN LAW TIMES.

NOVEMBER, 1892.

PHASES IN THE LAW OF TRUSTS (*a*).

How Distinguished from Contract.

SIR FREDERICK POLLOCK, in his work on Contract, suggests that it is quite possible, and may for some purposes be useful, to regard a trust as in its origin a *contract between the author of the trust and the trustee*; and, he adds, "The true way to understand the nature and incidents of equitable ownership is to start with the notion *not of a real ownership* which is protected only in a Court of equity, *but of a contract* with the legal owner, which (in the case of trusts properly so called) cannot be enforced at all, or (in the case of constructive trusts, such as that which arises on a contract for the sale of land) cannot be enforced completely, except in a Court of Equity" (*b*).

This observation of Sir Frederick Pollock does not afford (and it is not intended to afford) an accurate and adequate explanation of all the distinctive peculiarities which are incident to a trust. If A. enters into a mere

(*a*) The following article consists of extracts from a Course of Lectures on Trusts, delivered before the Students of the Law School at Osgoode Hall.

(*b*) Pollock on Contract, 5th Ed., 197-8.

contract with B., it is quite clear that A. and B. can enter into a subsequent contract by which all the obligations created by the prior contract may be dissolved. If, therefore, the relationship between the author of the trust and the trustee were that of mere contract, the author of the trust and the trustee would always be at liberty to put an end to the trust, of their own mere motion, by simply entering into a subsequent contract rescinding the prior contract, while it is quite clear that in the case of a trust the author thereof and the trustee cannot put an end thereto without the concurrence of the *cestui que trust*.

A practical application of the doctrines here referred to arises when we attempt to determine whether a given contract made between two persons for the benefit of a third person who is not a party thereto, can be enforced by such third person in his own right.

Thus, if A. and B. enter into a contract whereby they mutually agree that each of them shall pay $1,000 to C. (who is not a party to the contract), and that C. shall have a right of action therefor against both A. and B. it is well settled that C. cannot maintain an action based upon this contract (*c*).

These questions are much discussed in *Re Flavelle* (*d*), and *Gandy* v. *Gandy* (*e*), where it is determined that to entitle a third person, not named as a party to a contract, to sue either of the contracting parties, that third person must possess an actual beneficial right which places him in the position of *cestui que trust* under the contract (*f*).

Lord Westbury says, "*An obligation to do an act with respect to property* creates a trust" (*g*).

(*c*) See Pollock on Contract, 5th Ed., 200, *et seq*; and see 2 C. L. T. 50 and 109.

(*d*) 25 Ch. D. 89. (*e*) 30 Ch. D. 57.

(*f*) See also *Roberts* v. *Hall*, 1 Ont. R. 388; *Mitchell* v. *City of London Assurance Co.*, 15 App. R. 262; *Re McMillan*, 17 Ont. R. 344; *Most* v. *Gibson*, 21 Ont. R. 284.

(*g*) *Fleeming* v. *Hoden*, 1 Sc. App. 372; and see *Legard* v. *Hodges*, 2 Rev. Rep. 146, cited with approval in *Tailby* v. *Official Receiver*, 13 App. Cas. at p. 546.

This *dictum*, however, cannot be adopted as a safe guide for the purpose of enabling us to determine whether the obligation in a particular case creates a trust or rests merely in contract. Thus, if A. covenants with B. that he will build a house upon the lands of B., he thereby creates an obligation to do an act with respect to property, and yet no trust is created.

The practical difficulty that is experienced in drawing the line of demarcation between trusts and contracts will be seen upon reference to *Wilson* v. *Lord Bury* (*h*), in which case Lord Justice Brett held that the transaction out of which the controversy grew was a contract and not a trust; Lord Justice Baggallay held that it was a trust growing out of a contract, and Lord Justice Bramwell was not quite sure which it was.

The difficulty and importance of determining in that case the question of trust or no trust will be seen from a statement of the facts of the case. A company had been formed for the purpose of receiving money from depositors and investing it upon security. The defendants were directors of the company. The plaintiff deposited with the company the sum of £1,000 upon the terms that it should remain in their hands for five years, and that they should meanwhile pay him interest at the rate of six per cent., that by way of security they should transfer to him a mortgage made to them, and that if the mortgage should become ineffective before the expiration of the five years they would replace it by another. The mortgage upon which the £1,000 belonging to the plaintiff was secured, was paid off before the expiration of the five years, but the company did not replace it by another, and dealt with the proceeds as part of the funds of the company. The company ultimately went into liquidation, and the plaintiff then sued the directors of the company to recover from them the said sum of £1,000 paid by him to the company, upon the ground that the said moneys were held in trust for him by the company, and that they were lost to him

(*h*) 5 Q. B. D. 518.

by means of a breach of trust committed by the company, which breach of trust the defendant directors had aided and abetted, by reason of which participation in the breach of trust it was claimed that the defendants were liable to recoup the plaintiff for the loss so suffered by him.

Lord Justice Brett (at page 530) quotes Story's definition of a contract: "A contract is a deliberate engagement between competent parties upon a legal consideration to do or abstain from doing some act," and he then says: "There can be no doubt, in my opinion, that the stipulations in the present case are within such a definition, and that there was a binding contract between the plaintiff and the Company, with a *complete remedy according to the common law for every breach of it.* It would have been necessary to apply to equity to decree a specific performance of it, but for a breach of it the common law gave a complete remedy. Do such stipulations in a binding contract constitute a trust? A trust in the most enlarged sense in which that term is used in English jurisprudence, may be defined to be *an equitable right, title or interest in property, real or personal, distinct from the legal ownership thereof* (*i*). A trustee is a person holding the legal title to property under an express or implied agreement to apply it, and the income arising from it, to the use and for the benefit of another person, who is called the *cestui que trust. Trusts are, therefore, equitable interests in property, based on confidence, over which Courts of Equity alone have full jurisdiction* (*j*); A trust is where there is such a confidence between parties that no action at law will lie, but is merely a case for the consideration of this Court (*k*). If I am right in saying that the arrangement to be collected from the documents, which passed between the plaintiff and the Company, *would give the plaintiff a complete remedy at common law for any breach by the Company, then the arrangement is not a trust* within these definitions. And upon this question, *Ferguson*

(*i*) Story's Eq. Jurisprudence, 5, 964.

(*j*) Story on Contracts, s. 296 (4th Ed.).

(*k*) Lord Hardwicke, in *Sturt* v. *Mellish*, 2 Atk. 612.

v. *Wilson* (*l*), before cited, seems much in point. In that case the directors had bound the Company to allot shares to the plaintiff. 'This,' said Turner, L.J. (*m*), 'is contract. This is not a case of trust; this is simply a case of contract.' In the present case, the directors bound the Company to pay interest, to supply a security, to replace an exhausted security, to repay the principal. *These are all acts which the Company is bound at law to do.* This is contract, and not trust. It is like the relation of banker and customer, which is contract, and not trust."

Another case showing the importance, as well as the difficulty of deciding whether a given transaction creates a trust or rests merely in contract, is *Coyne* v. *Broddy* (*n*). It is provided by Statute (*o*) that "No claim of a *cestui que trust* against his trustee for any property held on an *express trust*, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations."

The point to be determined in the case in question was whether, upon the facts, there was created an express trust within the meaning of that term as used in the Statute.

The facts were that the plaintiff, Mrs. Coyne, a widow, held certain notes made by one Fletcher, and one Broddy, who was engaged in the business of collecting and investing money, suggested that the plaintiff should hand over these notes to him, as certain money belonging to Fletcher was going through his hands, and that if he had the notes he could collect them, and so "*save them for the widow and orphans out of that money.*" The notes were given to him, and he collected them, but did not pay over the money, which remained unclaimed in his hands for eight years, when he made an assignment for the benefit of his creditors. His assignees set up the Statute of Limitations against the claim of Mrs. Coyne, who thereupon brought an action to recover the amount so collected for her by Broddy. In the Divisional Court, Boyd, C., was of opinion that Broddy did not hold moneys upon an express trust for

(*l*) L. R. 2 Ch. 77.
(*m*) L. R. 2 Ch. at p. 88.
(*n*) 15 App. R. 159.
(*o*) Jud. Act, s. 53, s-s. 1.

the plaintiff, and that therefore the Statute of Limitations operated to bar her claim, while Mr. Justice Proudfoot was of the contrary opinion. The law of the case was very fully discussed by these two learned Judges (*p*). The Court of Appeal (*q*) sustained the contention that Broddy held the moneys upon an express trust for the plaintiff, and that therefore the Statute of Limitations did not bar her claim, upon the ground that it was the intention of the parties that Broddy was to receive and *hold the money for the plaintiff, and was not to pay it over to her at once*, and that "*He was to invest it for her, not to keep it laid up in a napkin.*"

If the arrangement had been that Broddy should collect the moneys and immediately pay it over to the plaintiff, he would upon collecting the money have become simply a debtor of hers and not a trustee for her.

Parol trusts to purchase land.

Mr. Lewin says:—"The rule, as at present established, will not warrant the admission of parol evidence, where an estate is purchased by an agent, and *no part of the consideration is paid by the employer*; for, though an agent is a trustee in equity, yet the trust is one arising *ex contractu* and not by reason of law" (*r*). This is in accord with the view of Judge Story, as expressed in section 1, 201*a* of his work on Equity, but the opinions of both these learned authors are based upon *Bartlett* v. *Pickersgill* (*s*), the soundness of the decision in which has been much questioned in modern times.

The case which has gone furthest in opposition to the rule enunciated by Judge Story and Mr. Lewin, is a decision of Chief Justice Taylor in *Archibald* v. *Goldstein* (*t*), which was a case where the plaintiff being desirous of purchasing property from a third person, employed the defendant as his agent to negotiate the purchase. The

(*p*) 13 Ont. R. 173. (*q*) 15 App. R. 159.
(*r*) Lewin on Trusts, 9th Ed. 176.
(*s*) 1 Eden, 515; S. C. 4 East, 577, note.
(*t*) 1 Man. L. R. 8.

defendant purchased the property, using his own money, and took the conveyance to himself. It was held that the defendant was trustee for the plaintiff, and that his trusteeship could be established by oral evidence, and that the Statute of Frauds was no protection to him. The learned Judge says:—"A few years ago one of the Judges of the Court of Appeal in Chancery, Lord] Justice Giffard, in the case of *Heard* v. *Pilley* (*u*), expressed as his opinion that *Bartlett* v. *Pickersgill* was inconsistent with all the authorities of the Court, which, he said, proceed on the footing that it will not allow the Statute of Frauds to be made an instrument of fraud. In the same case, Lord Justice Selwyn said that such an argument on the part of an agent was 'an attempt to make the Statute of Frauds an instrument of fraud.' It is true that it was not necessary for the purpose of disposing of *Heard* v. *Pilley* to overrule *Bartlett* v. *Pickersgill*, and the Lords Justices did not attempt to do so, but they certainly expressed, in unequivocal terms, their opinion against the authority of that case. Against this, it must, however, be borne in mind, that Mr. Lewin, no mean authority, in the last edition of his book on trusts, published since *Heard* v. *Pilley* was decided, takes no notice of it, or of the remarks of the Lord Justices, but treats *Bartlett* v. *Pickersgill* as if an unshaken authority. On the other hand, that writer nowhere refers to the case of *Lees* v. *Nuttall*" (*v*).

The authorities bearing upon the subject are collected and discussed in *Ross* v. *Scott* (*w*). That was a case in which the plaintiff was interested as a subsequent incumbrancer in certain lands which were sold by public auction in a suit brought by a prior incumbrancer; and the plaintiff, desiring to protect his interest, determined to purchase the lands, and thereupon entered into an agreement with the defendant, whereby it was orally agreed that the defendant should attend the sale and buy in the lands in his own name, but as agent for the plaintiff, and for the use

(*u*) L. R. 4 Ch. 553.
(*v*) 1 R. & M. 53; Tamlyn, 282; 2 My. & K. 819.
(*w*) 21 Gr. 391, and 22 Gr. 20.

and benefit of the plaintiff; and that fifty dollars of the deposit should be advanced on behalf of the plaintiff, and that the defendant should advance the balance of the deposit and the balance of the purchase money, and should hold the lands as security for the amount so advanced by him, and after repayment thereof should convey the lands to the plaintiff. The plaintiff and the defendant both attended the sale, and through a misunderstanding the plaintiff bid for the lands and they were knocked down to him, but the defendant, with the consent of the plaintiff, signed the contract of sale, and paid the balance of deposit, over and above the fifty dollars advanced on behalf of the plaintiff, and was declared to be the purchaser, and afterwards paid the balance of the purchase money and obtained a conveyance in his own name. The defendant sold portions of land and kept an account of his outlay, and of the proceeds of the property. The plaintiff brought his suit for a conveyance of the remaining portions of the lands from the defendant to himself; and the defendant answered his bill denying that the plaintiff had any interest in the lands and relying upon the Statute of Frauds. Blake, V.C., gave the plaintiff the relief sought by him, holding that the case was taken without the provisions of the Statute of Frauds by the facts above stated, and more especially by the fact that the $50 had been advanced on behalf of the plaintiff, and that the *account kept by the defendant* was inconsistent with his being the absolute owner of the lands, and this holding was affirmed by the full Court on rehearing.

The next case in our Courts touching the question, is that of *Kitchen* v. *Dolan* (*x*), in which the plaintiff, being desirous of purchasing certain lands which were to be sold by auction, but being unable to raise the purchase money, arranged with the defendant by verbal agreement that she should be his surety for the payment of the purchase money; and the plaintiff thereupon attended the sale and the property was knocked down to him and he was

(*x*) 9 Ont. R. 432.

declared the purchaser; but, for the purpose of carrying out the arrangement, the contract of sale was signed by the defendant alone, who thereupon claimed to have purchased the land for her own use and benefit. The plaintiff then brought his action against the defendant and the vendors to procure a conveyance to be made to himself, but after the commencement of the action the vendors conveyed to the defendant, and the action was then dismissed as against them. Judgment was given in favour of the plaintiff, and the case was distinguished from *Bartlett* v. *Pickersgill* on the ground that in the latter case the action was not brought until after the legal estate in the lands had been conveyed to the defendant, while in *Kitchen* v. *Dolan* the action was brought before the defendant had procured a conveyance of the legal estate, and while, as between herself and the vendors, she had only the equitable interest of a purchaser.

One of the most recent cases upon the subject is *James* v. *Smith* (*y*), which gives countenance to the distinction drawn in the lastly-mentioned case, between a case in which the legal estate in the lands has been conveyed to the alleged agent, and a case in which no conveyance has yet been made, and the contract is still executory; and it was there determined that when the agent appointed by parol pays the consideration money out of his own pocket, and *takes a conveyance of the legal estate to himself*, no relief can be obtained against him by his principal.

It is submitted that this is not a satisfactory ground of distinction, and that it is better to either go the whole way with Chief Justice Taylor in his holding in *Archibald* v. *Goldstein*, or to hold that the Statute of Frauds will afford a defence in all such cases, whether the legal estate has been conveyed or not, rather than to rely upon a distinction of so thin a character.

The question involved is as to the admissibility of certain oral evidence to take a case out of the provisions

(*y*) L. R. 1891, 1 Ch. 384.

of the Statute of Frauds, and the writer is not aware of any reason for holding that the admissibility of such evidence is in any way affected by the fact that the estate in the lands in question is in one case a legal estate, and in the other case an equitable estate. The majority of the cases belonging to the class, of which *Bartlett* v. *Pickersgill* is the leading case, have recently been commented upon and distinguished in a judgment in the Supreme Court of Canada, in which Mr. Justice Strong treats *Bartlett* v. *Pickersgill* as being correctly decided and as being an authority which should be followed at the present day.

A. H. MARSH.

APPOINTMENT OF QUEEN'S COUNSEL: OPINION OF MR. MADDEN.

THE honourable the Attorney-General of South Australia has seen me in conference, and submitted for my consideration certain regulations made in South Australia in 1865 by the then Governor-in-Council, which provide that no barrister shall be appointed to be Her Majesty's Counsel except on the recommendation of the Chief Justice to the Governor-in-Council, and fixing certain fees to be charged in connection with the appointments, and licenses to appear against the Crown.

He also placed before me a copy of the commission appointing His Excellency the Earl of Kintore Governor of South Australia, and the letters patent (issued April 28, 1877) referred to in that commission, together with a copy of the royal instructions at present in force; and the honourable the Attorney-General desired that I would consider these, and such other material as bore on the question, and give my opinion on the following matters:

1. Whether any authority at present exists in any person or body in South Australia legally to appoint Queen's Counsel?

2. If there be such authority, in what manner should it be exercised?

3. Are the regulations above referred to of legal validity?

I have given the matter close attention, and have consulted all the authority which is available to me on the subject, and I have arrived at the opinion that there is not at present existing any lawful authority in any one in South Australia to appoint Queen's Counsel.

The right to appoint Queen's Counsel forms a part, as is well known, of the Royal prerogative of bestowing titles of honour: Bl. Com., 21st ed., 27; Chit. Prerog., 118. These

prerogatives, like other Royal prerogatives, are exercisable only by the Sovereign. Like other principals, however, the Sovereign can delegate her authority in this respect to her lawfully authorized agents; and the first question to be ascertained is whether Her Majesty has, in the present instance, delegated her prerogative of bestowing titles of honour, or any part thereof, to anyone in South Australia.

The only possible direct "agent" of Her Majesty at present in South Australia is His Excellency the Governor, and so the question confines itself to whether he has had delegated to him the prerogative referred to, or, at any rate, that part of it relating to the appointment of Queen's Counsel. To ascertain this, the first step, as it appears to me, is to see what is the exact relation of the Governor to Her Majesty. At one time it appeared to be thought that a colonial governor was a viceroy, that is to say, an officer seised by the authority of the Sovereign (either by letters patent or expressed by the Sovereign's assent to an Act of Parliament), of the Royal authority within the territory assigned to him *totius juris*, so that within such territory he was practically to all intents and purposes the Sovereign, and all his acts as valid as the Sovereign's could be, subject to his answering for misconduct to the Sovereign.

In the case of *Mostyn* v. *Fabrigas*, 1 Sm. L. C. 628, 9th ed., Lord Campbell speaks of such a Governor as in the nature of "a Viceroy," p. 645. In *Cameron* v. *Kyte*, 3 Knapp 332, however, (decided in the Privy Council in 1835) it was distinctly laid down that "the Governor of a colony has not by virtue of his appointment the Sovereign authority delegated to him, and an act done by him on his own authority, unauthorized either by his commission, or expressly or impliedly by any instructions, is not equivalent to such an act being done by the Crown itself, and is, consequently, not valid, and the court of the colony over which he presided could not give it any legal effect."

This decision was recognized and acted on in the Privy Council in 1841, in *Hill* v. *Brigge*, 3 Moo. P. C. 465 in which Lord Brougham, delivering the judgment of the

council, says: "If it be said that the Governor of a colony is quasi Sovereign, the answer is that he does not even represent the Sovereign generally, having only the functions delegated to him by the terms of his commission, and being only the officer to execute the specific powers with which that commission clothes him." And his lordship, referring to the dictum of Lord Mansfield, in *Mostyn* v. *Fabrigas* above referred to, to the effect that "a Governor is in the nature of a Viceroy," etc., quite disagrees with it.

Again, in 1879, the Privy Council, in *Musgrove* v. *Pulido*, 5 App. Cas. 102 decided, following amongst other authorities, *Cameron* v. *Kyte*, and *Hill* v. *Brigge*, that the Governor of a colony (in ordinary cases) cannot be regarded as a Viceroy, nor can it be "assumed that he possesses general Sovereign power. His authority is derived from his commission, and limited to the powers thereby expressly or impliedly entrusted to him. It is within the province of municipal courts to determine whether an act of power in a Governor is within the limits of his authority." This case also decided that when in a municipal court the authority of the Governor is relied on as an act of the Sovereign power, the party relying on such proposition, must, in his pleading, set out the facts which show how the Sovereign power is alleged to exist in the Governor, and that it is not sufficient merely to allege generally that the act was an exercise of the Sovereign power, as it probably would be if the Governor were a Viceroy.

In the case of *Toy* v. *Musgrove*, 14 V. L. R. 849, in the Supreme Court of Victoria, Williams, Holroyd, and à Beckett, JJ., held similarly that the authority of the Governor of Victoria, under letters patent and instructions precisely similar to those prevailing in South Australia and under the Constitution Acts of that colony, which, for their present purpose, are substantially similar to those of South Australia, was limited by the terms of those instruments, and did not authorize the exercise by the Executive Government of Victoria of the Royal prerogative to exclude aliens. The judgment in this case has since been reversed by the Privy

Council, but on grounds which leave the above ruling untouched. Indeed, the council refused to consider it on the ground that it was a point which an alien was not entitled to raise in a British court. See on this general proposition also Todd, Par. Gov. Brit. Col., pp. 225 and 226.

It will be observed that the cases of *Cameron* v. *Kyte* and *Musgrove* v. *Pulido* relate to Governors of Crown colonies, but, in my opinion, that fact does not limit or affect the generality of the decisions in these cases when sought to be applied to the case of Governors of self-governing colonies like South Australia. In each case the Governor remains the representative and servant of the Sovereign, but, in the latter case, there is superadded to his commission or instructions any provision which may exist in the Constitution Acts of the colony enlarging or curtailing his authority which must be interpreted on its merits.

The result, therefore, of all these authorities appears to be that the authority of a colonial Governor is limited to the powers conferred on him expressly by the instrument appointing him, or by an Act of Parliament assented to by Her Majesty, or to such powers as being absolutely necessary to the due discharge of his office, must be deemed to have been conferred on him.—See *Cameron* v. *Kyte*, *supra*, pp. 345 and 346. This latter view is, I presume, based on the well-known principle involved in the maxim *quando lex aliquid alieni concedit conceditur et id sine quo res non esse potest.* The next step in the present enquiry would seem naturally to be to examine the existing instruments which evidence the authority of His Excellency the Governor of South Australia, to ascertain how far they or any of them warrant the appointment of Queen's Counsel, but before proceeding to do so it will be convenient to consider the case of *Lenoir* v. *Ritchie*, Todd's Par. Gov. in the British Colonies, p. 241, which has a bearing on the general proposition above referred to.

That case arose in Canada in 1872, after the union of the several provinces to form the Dominion. The question had arisen whether the Lieutenant-Governor of the Province

of Ontario, as the representative of Her Majesty, although appointed by the Governor-General (as all the Lieutenant-Governors were), and not by Her Majesty herself, has authority to appoint Queen's Counsel, and, in the course of the dispute, the opinion of the English Crown law officers was asked for, and it was given through the Secretary of State, to the effect that the Lieutenant-Governor had that authority, but the Secretary of State advised that in order to make the matter more sure the Provincial Legislature should pass an Act of Parliament authorizing the appointment of Queen's Counsel. This suggestion was acted on by all the Provincial Legislatures, and the Legislature of Nova Scotia passed an Act which authorized such appointment prospectively, but a Mr. Ritchie, a Q.C., appointed by the Governor-General, determined to test the right to precedence under the Act, and he brought an action in the Supreme Court of Nova Scotia, where it was held that the Nova Scotian statutes were not *ultra vires*, inasmuch as Her Majesty, through her Secretary of State, had suggested the passing of the Acts, and had afterwards through the Lieutenant-Governor, given her assent thereto thereby authorizing, at all events prospectively after the passing of the Act, Lieutenant-Governors of the provinces to exercise her prerogative right to the extent to which it is necessarily conferred on that high officer by the statutes, but, as the precedence claimed by the gentlemen who had received provincial appointments over Mr. Ritchie had been declared to be retrospective, contrary to those provisions of the statute, the Court decided that their claim was unauthorized and invalid. An appeal was then had to the Supreme Court of the Dominion, which decided to dismiss the appeal, and, by a majority, "that the appointment of Queen's Counsel was part of the Royal prerogative, and appertained to the Sovereign herself, or to her direct representative, the Governor-General. That the British North America Act, 1867, does not, either expressly or by inference, divest Her Majesty of this branch of her prerogative, or enable the Lieutenant-Governors of the provinces, either with or without an authority derived

from the Provincial Legislatures, to exercise the same. That authority to exercise this prerogative could not be conveyed by a mere despatch from the Secretary of State, but only by warrant under the Sovereign's sign manual; wherefore, the Acts of the Nova Scotia Legislature (and, by the same rule, the Acts of the other Provincial Legislatures), in so far as they assume to invest the Lieutenant-Governor with power to appoint to the rank or dignity of Queen's Counsel, are *ultra vires* and void; for the Queen is not an integral part of the Legislatures of the provinces, as she is expressly declared to be of the Dominion Parliament by the British North America Act, and therefore no provincial statute can impair or affect Her Majesty's right to the exclusive exercise of all her prerogatives, rights, and powers."

The result was that the precedence claimed by the Nova Scotian Queen's Counsel over Mr. Ritchie was disallowed. This case did not go to the Privy Council. The judgment, however, it will be observed, contained the dictum that the Governor might, as the direct representative of Her Majesty, have appointed Queen's Counsel for all parts of the Dominion, and this dictum may be in this enquiry the most important part of that case. If it meant that inherently, and by mere force of his position, independently of any express authority contained in his letters patent or instructions, he had the power to appoint Queen's Counsel, then it would be holding him to be a Viceroy. This, however, would be opposed to the Privy Council's decision already quoted, and it is to be observed that the majority of the courts argued apparently that because the British North America Act of 1867 did not divest "Her Majesty of this branch of the prerogative," therefore it passed as of course to the Governor-General; but the cases cited by me insist that a colonial Governor does not take any power "generally," but must be expressly invested by commission with any power intended to be given to him. The statement to which I am now referring, however, was a dictum, merely, and not necessary to the decision, and it does not appear that either *Cameron* v. *Kyte* or *Hill* v. *Brigge* were

brought to the notice of the court, and *Musgrove* v. *Pulido* had not yet been decided.

The suggestion has been made that although a Governor may not have had authority to exercise some particular portion of the Sovereign power, still, if he in fact assumes to exercise that power, and the Sovereign does not expressly interfere to disavow or disaffirm his act, the Sovereign is to be deemed to have ratified such act, and that in this way an authority might be presumed to arise out of a practice not disavowed. This view, however, was very distinctly disagreed with in *Cameron* v. *Kyte*, 3 Knapp 346, and is also similarly treated by Holroyd and à Beckett, JJ., in *Toy* v. *Musgrove*, 14 V. L. R. 428 and 435.

I am of opinion that the appointment of Queen's Counsel is clearly not such an act as is necessary to the due discharge of the office of Governor so as to confer the power of appointing them by implication within the meaning of the expression used in the judgment of the court in the case of *Cameron* v. *Kyte*, *supra* p. 345. There is no necessity of any kind in the matter, the appointment being a title to precedence to the individual counsel in consideration of which his services are retained by the Crown. But so far as this retention is concerned, the Crown can secure it in the ordinary way in which subjects can, and so no necessity for appointing Queen's Counsel need exist so far as the interests of the Queen's Government are concerned.

For all the foregoing reasons the authority of His Excellency to appoint Queen's Counsel in South Australia is to be looked for in the terms of his letters patent, or of his instructions, or of the Constitution Acts of South Australia only. In neither the Imperial Act authorizing the constitution, nor the Constitution Act itself, can I find anything at all suggesting the right to exercise the particular prerogative in question by anyone through the express concession to the Governor of the prerogatives of summoning, proroguing, and dissolving Parliament, of choosing and dismissing Ministers, both in the Acts referred to as well as in the Governor's instructions and

letters patent, which, of themselves, further concede the prerogatives of appointing the judiciary and the prerogative of mercy, would on ordinary legal principle, seem to exclude the assumption that the prerogative of bestowing titles of honour was intended to be conceded to him or to anyone else.

There are some prerogatives which may not be, as a matter of Imperial policy and prudence, safe to confide to colonial Governments, for example, the prerogative of war or peace, and, amongst these, that of the bestowal of titles of honour may be included, because, if the Governor has authority by any condition outside the express terms of the instruments already referred to, to appoint Queen's Counsel, he must by the same condition, have authority to create a duke or a marquis, for these, though sometimes appointed by writ summoning the person ennobled to the House of Lords, may be appointed by letters patent just as Queen's Counsel, and each preferment is part of the same prerogative, and, although colonists might, without great difficulty, be found, who would bear these dignities not unworthily, still the Crown may easily be understood to have desired to retain all control of titles of honour, and to have therefore refrained from parting from the prerogative to the Governors of colonies, the conditions of whose letters patent and appointment, and whose instructions have the approval of the Imperial Parliament.

The only remaining possible sources of the authority in question are the letters patent and instructions. It is suggested, I understand, that paragraph V. of the letters patent confers on the Governor that authority, and I believe that it is on this same clause that the various Governments of the Australian colonies which have appointed Queen's Counsel have purported to act. In my opinion (with great respect to those who have so acted) the paragraph in question confers no such authority. It, in my opinion, provides for the appointment of judicial officers only, and to assume that a Queen's Counsel is an "officer" in any sense (which I doubt), he is not I think, clearly an officer *ejusdem generis* with judges, commis-

sioners or justices of the peace, as he must be according to the ordinary rules of legal interpretation to satisfy the words "other officer" in paragraph V. It is, I presume, not disputed that a Queen's Counsel would not be a minister in any sense.

Except paragraph V., I can discover nothing in the letters patent or instructions which could by any interpretation suggest the authority in question.

Assuming, however, that the prerogative power to appoint Queen's Counsel is (contrary to my opinion) within the scope of the Governor's authority, the question then arises as to how it should be exercised. It seems undoubted that the Sovereign may constitutionally exercise her prerogative *ex mero motu*, and that if she chooses to do so in opposition to the opinions and wishes of her Ministers, their only remedy is to resign and allow the Sovereign to find other advisers if she can; but in England the advice of Ministers is uniformly sought by the Sovereign in relation to the exercise of the most, if not all of the branches of the Royal prerogative (see Todd's Par. Gov. Brit. Col., 226). In my opinion it would be constitutional and proper that a similar course should be pursued in South Australia more especially as paragraph VI. of the instructions enjoins on the Governor the duty of consulting his advisers on all matters except in the special cases therein mentioned.

Finally the question remains (again assuming that the prerogative under discussion exists within the scope of the Governor's authority) whether the regulations of January 9, 1875, are valid. All except the first, are, in my opinion, valid as being merely a statement of fees to be paid on admission to the position of Queen's Counsel, and for special permission to appear against the Crown.

The first of these regulations purports to assign to the Chief Justice permanently the right and duty of recommending barristers for the preferment. Since it appears to be quite lawful for the Sovereign, as I have before stated, to exercise the prerogative of conferring titles of honour *ex mero motu*, it would seem to me not unlawful for her or her

representative (if duly authorized to exercise the prerogative), to seek any advice which she or he desires. By long and unvarying practice, however, it has, it seems, become the uniform course for the Sovereign to consult with the executive in relation to the exercise of the prerogative, and so this has become the constitutional practice which the Governors of South Australia, purporting to exercise the prerogative, have also observed; and it was by Order in Council that these regulations were adopted. In my opinion one Government cannot effectually bind its successors in a matter of this kind, and so far as the regulations purport to have this effect, they are, I think, *ultra vires* and invalid. They are not regulations framed under any statute, but represent simply the means which the Government which framed them considered convenient for securing sound advice to the Governor in the exercise of the prerogative, and they bind no one after the Government which framed them retired. .

In this connection I have had the advantage of reading the letters addressed by his honour Mr. Justice Boucaut to the Hon. the Acting Chief Secretary and to His Excellency the Governor, explaining and justifying these regulations on the ground that it is advisable to withdraw the appointment of Queen's counsel from the sphere of political influence. I express no opinion on the question whether it may or may not be desirable to make these appointments non-political.

In England the Lord Chancellor is the particular person who recommends barristers to the Sovereign for the position of Queen's Counsel, but it must be remembered that the Lord Chancellor, though, like the Chief Justice in South Australia, the head of the judiciary, is, unlike the chief justice, also a political officer, whose position begins and ends (in practice, although there is authority for his right to continue in office after the Government of which he is a member retires) with the Government of which he is a member, and it is as a responsible member of the executive that he recommends barristers for the position

to the Crown. The appointments, too, are usually advisedly made for political reasons, either as a reward of political service or sympathy, or in order that Governments of all shades of political opinion may have Queen's Counsel available who will act in sympathy with them, not with professional ardour only, but with zeal of personal opinion and approval.

I have written at considerable length because the difficulty of further conferring makes it desirable to express one's self fully, but I hope that this fact will not give obscurity to the expression of my views.

JOHN MADDEN.

MELBOURNE, June 1, 1891.

EDITORIAL REVIEW.

Appointment of Queen's Counsel.

We print in this number the opinion of Mr. Madden of Melbourne, Australia, on the right of a Governor to appoint Queen's Counsel in the Colonies. The points taken by the learned gentleman are shortly as follows: (1) A Governor acting under instructions is bound by his instructions, and does not represent the Sovereign in matters not contained therein. Hence, as no specific power is given to appoint Queen's Counsel, his authority does not extend thereto. (2) *Lenoir* v. *Ritchie* in the Supreme Court of Canada was not well decided. (3) Queen's Counsel are not "officers" and are not necessary for the administration of justice.

As to the first, the cases cited are all cases upon the authority of Governors of Crown Colonies, and their authority necessarily depends on their instructions. But in Colonies having constitutions, we apprehend that the instructions not only do not define the Governor's duties and authority, but if contrary to the Constitutional Act of the Colony must give way to it. The Governors and Lieutenant-Governors of Canada directly represent the Sovereign, not in matters pointed out by the instructions (for the Lieutenant-Governors have none from the Sovereign), but in those matters of executive administration which are co-extensive and co-terminous with the subjects of legislation confided to the Parliament and the Legislatures: see *ante* p. 243. And as the administration of justice is one of the subjects of legislation, the Governor General and Lieutenant-Governors represent the Sovereign in that subject.

As to the third point, there is abundant authority for saying that Queen's Counsel are "officers" for the administration of justice. Regarding them in their true light as Counsel retained by the Crown, and prevented by their retainers from appearing against the Crown without leave, as they in fact are in England, it seems stretching the argument a long way to say that it is not necessary for the Crown to retain Counsel in the Colonies.

Football and Manslaughter.

Though the season for football is over, and Osgoode Hall has again proved its superiority on the field, the following case will be of interest to the teams :—*Regina* v. *Bradshaw*, 14 Cox. 83. Indictment for manslaughter. The deceased met with the injury which caused his death in a football match. The game was played according to the "Association Rules." The deceased was "dribbling" the ball when he was met by the prisoner, a player on the opposite side. Both were running at considerable speed. On approaching each other the deceased kicked the ball beyond the prisoner, and the prisoner, by way of "charging" the deceased, jumped into the air and struck him with his knee in the stomach. The deceased was led from the grounds and died next day, the cause of death being rupture of the intestines. Evidence unfavourable to the prisoner was given by witnesses who said that the deceased had kicked the ball beyond the prisoner before the latter "charged," and that therefore his charging was contrary to the rules of the game and done in an unfair manner. Other witnesses said that the kick and charge were simultaneous but they admitted that charging by jumping with the knee protruding was unfair. One of the umpires stated that in his opinion nothing unfair had been done.

The Judge (who was Baron Bramwell) in summing up said :—"There is no doubt that the prisoner's act caused the death and the question is whether the act was unlawful. No rules or practice of any game whatever can make

that lawful which is unlawful by the law of the land, and the law of the land says you shall not do that which is likely to cause the death of another. * * * Therefore in one way you need not concern yourselves with the rules of football. But on the other hand if a man is playing according to the rules and practice of a game and not going beyond it, it may be reasonable to infer that he is not actuated by any malicious motive or intention, and that he is not acting in a manner which he knows will be likely to be productive of death or injury. * But independent of the rules, if the prisoner intended to cause serious hurt to the deceased or if he knew that in charging as he did he might produce serious injury or not, then the act would be unlawful. In either case he would be guilty of a criminal act."

The prisoner was acquitted.

CORRESPONDENCE.

Appeal Books.

To the Editor of THE CANADIAN LAW TIMES:

SIR,—From time to time complaints are made respecting the cost of appeals to the Court of Appeals.

It is said that the printing of appeal books, many of which are over 100 pages in length and some of them a great deal longer, is needlessly required, and it is hinted that appeals might just as well be heard upon the same material (manuscript or otherwise) as was used in the Court below.

Under the practice followed, I fear, by most of us for many years past, almost every document which has ever had any bearing upon the case from its inception, is printed *in extenso*; and hence the cost of appeal books is heavy, the printer's charge usually amounting to $1.50 per page, not to speak of the solicitor's fees for preparing and correcting the book.

It has not occurred to anyone, so far as I know, to suggest any other remedy than the one above indicated.

And yet a very simple remedy is at hand, namely to follow the directions of the Rule applicable to these appeals.

Consol. Rule 813 provides:

"The appeal shall be a step in the cause or matter in which the judgment complained of was given, and shall be upon a case to be stated by the parties, or in the event of difference to be settled by the Court appealed from, or a judge thereof, and shall set forth so much of the pleadings, evidence, affidavits, documents and the ruling or judgment objected to, as may be necessary to raise the question for the decision of the Court of Appeal."

The above provision is not new, it has been in force for years, and it is only by its systematic neglect that appeal books are so bulky and expensive.

But the trouble of "stating a case" is not thereby saved; it is only shifted from the solicitors to the judges of the Court of Appeal, who practically have to state each case in order to make their judgments intelligible.

Many appeals involve only a point of law which might be well enough expressed on a page or two of print. Others, in which the facts originally in dispute necessitated lengthy examinations and trials, arrive at the Court of Appeal shorn of the greater portion of their disputed facts; and yet all the depositions, evidence and exhibits, whether applicable or not to the remaining facts in dispute, find their way into the appeal book.

This system may have arisen from a fear lest something of importance should be omitted; but the chances of a miscarriage in this particular are infinitely less at this stage of the case than they were at the trial.

It must be admitted that the system, such as it is, has been countenanced rather than discouraged by the framers of our Rules who have, by Rule 823, provided so comprehensively for the details of appeal books.

Perhaps a satisfactory solution of the question might be attained by steering a middle course between the brevity of a case stated, and the prolixity of an average appeal book, by permitting the parties to print only the case stated, and to refer to the pleadings, evidence and documents produced, in their manuscript or type written form, as exhibits to the case.

Yours, etc.,

A. C. GALT.

TORONTO.



THE CANADIAN LAW TIMES.

DECEMBER, 1892.

AMENDMENTS TO THE RULES.

THE report of the sub-committee of the County of York Law Association upon the Consolidated Rules has been prepared and is now in the hands of the Judges for their consideration. It is a rather voluminous document, covering as it does some twenty-two printed pages of the size of an appeal book. The report deals with a large number of the rules, and proposes reforms which the committee deems to be important and urgent. It is well that the profession at large should have some idea of the nature of the proposed changes in order that they may be discussed, and that the weight of opinion in the matter may make itself felt.

The sittings.—The first clause of the report deals with a series of suggestions transmitted to the committee by the Law Association of the County of Elgin. As these regard the fusion of the Courts, the alteration of the circuits, the re-arrangement of the weekly sittings and other cognate matters, they, with certain of the rules, are referred to a committee of the Benchers appointed to consider such questions, and it is trusted that they will receive consideration. The Benchers have been giving attention to these subjects for some time, although no practical outcome of

their labours is at present apparent. It may encourage them to renewed exertions to know how strong and unanimous the opinion of the profession is as to the necessity for a more economical distribution of the labours of the Judiciary and a more convenient arrangement of the circuits and weekly sittings.

In the next clause of its report the committee points out that the practice, in several respects which in its view require amendment, has its origin in the statutes, and alteration would have to be effected through the intervention of the legislature. The conclusion is that it would be infinitely more satisfactory to have a complete revision of the practice than to amend piece-meal. Tinkering with the rules here and there cannot produce a consistent and comprehensive code.

Settled estates.—It has been customary, as one mode of defining the practice, to declare the continuation of an existing practice or to adopt that of some other court of a certain date. The opinion of the committee is that the rules should be a complete code in themselves from which it would be possible to ascertain the practice without reference to other systems. An example in point is referred to. Section 32 of the Judicature Act gives us the practice as it existed under the English Settled Estates Act in 1865. Since that date the English procedure has been modified and rendered simpler and more elastic in operation. Not only is one driven to the English practice when calling the Settled Estate Acts into operation, but to a partially obsolete English practice of more than twenty-five years ago. The difficulty alluded to is one continually met with and the natural cure is a revision which will result in a code of practice complete in all respects. The committee, not having authority to deal with a question as wide as this, merely offers its suggestions, trusting that they will receive weight in the proper quarter.

Appeals from a Judge.—Another anomaly to which attention is called is the practice as to appeals from a single Judge. At present a mere chance may determine whether there shall be the right to go to the Divisional Court, or

whether it shall be necessary to incur the considerably greater expense of an appeal to the Court of Appeal. An illustration is afforded by the case of demurrers. It is the almost uniform practice of some Judges to refer them to the trial Judge. If so referred and disposed of at the trial the whole case can be brought before a Divisional Court, whereas if the single Judge chooses to decide the matter it is necessary to carry that portion of the case to the Court of Appeal. There appears to be no reason in the nature of things why an appeal should not lie to the Divisional Court from all orders made by a single Judge, whether in Court or in Chambers, though perhaps it would be desirable to limit further appeals in certain cases. This is a matter, however, which necessitates an amendment of the Judicature Act, and the committee did not feel justified in dealing with it further than by making this recommendation.

Fusion of offices.—The first rule with regard to which there is any important suggestion is Rule 23, which deals with the duties of the Clerk of Records and Writs. The committee calls attention to the fact that it is the only rule referring to the various matters which it covers, and that there are no similar rules with regard to the offices of the Registrars of the Queen's Bench and Common Pleas Divisions. Doubtless the intention of the framers of the rules was to merge the three offices into one. This intention has in some manner been thwarted; but the position of affairs has been represented to the Attorney-General, and it is hoped that the fusion which the rules provide for will be carried into effect. It is scarcely credible that since the Consolidated Rules were passed there has not been authority to exact so much as a filing-stamp in the Queen's Bench and Common Pleas offices. What course would be taken should some John Hampden bring the question up by way of *mandamus* is a pleasant speculation which might be indulged in with profit by the officers who have been exacting these fees without authority. As has been pointed out in these columns, the practical advantages of a fusion of the offices are great. At present a search may extend over some eight or ten places of deposit for papers, and most

practitioners know from experience what a saving of expense and labour would result if one central office had all documents in charge.

Clerk of Assize.—An alteration in Rule 28a is suggested to meet the recurring inconvenience of the Clerk of Assize having no office at Osgoode Hall, where business in connection with the Assizes can be transacted. It is obviously desirable that one should be able to set down an action in the same office where the proceedings are carried on and the record passed.

Master in Chambers.—There are two or three amendments to Rule 30 which deserve mention. No reason exists for witholding from the Master in Chambers the power to grant leave to appeal in certain cases after the time limited for that purpose has expired. This is essentially a matter of practice, and it would suffice if applications for leave to appeal to the Divisional Court or to the Court of Appeal were excepted from his jurisdiction. The result would be the saving of a good deal of time to the Judges and a uniformity of practice which does not exist.

Again, the referring of causes (except by consent) is withheld from the Master. Under the former rules only references of a certain character were aimed at. It is obvious that certain references the Master must direct as he cannot otherwise make an effective judgment,—in mortgage actions for example. He should have power to refer matters of account when it becomes necessary. This would not be conferring a new power upon him but merely restoring the condition of things as it was before the Consolidated Rules.

The same rule forbids the Master to stay proceedings after verdict or judgment. This again is much wider than the former rule. The Master has power to set aside irregular judgments or executions. It is absurd that having this power he should not be able meanwhile to stay proceedings, and yet the rule forbids him to do so. What is really aimed at is that he should not have power to stay proceedings after verdict or judgment entered upon verdict, and it is proposed to make the rule so read.

Referee's Reports.—An amendment of Rule 40 is suggested with a view to settling a much vexed question. A variety of opinions are held as to the manner in which reports of Referees under sections 101 and 102 of the Judicature Act should be treated. The only reported case (*a*) decides that the report of a Referee under section 101 of the Judicature Act is in no sense the equivalent of a report of a Master; it does not require to be filed; lapse of time does not confirm it; it may be moved upon or moved against immediately after it is made, and may be adopted or rejected, in part or in whole, or varied, and upon a motion for judgment it is open to either party to go fully into the evidence on which it is founded. There does not seem to be any substantial objection to the practice as thus expounded; but the committee considers that no sound reason exists for making so marked a distinction between reports of Masters and reports of Referees, and the proposed alteration is for the purpose of assimilating the practice with regard to them. It was thought that the advantage on the whole was in favour of the manner in which Master's reports were dealt with, and that it would be wiser to adopt in the case of the reports of Referees the time-honoured rules of the Court of Chancery with regard to the reports of Masters rather than follow in both cases the practice as laid down in *Raymond* v. *Little*. What is really sought for, and what is particularly desirable, is uniformity. At present *Raymond* v. *Little*, though it has never been over-ruled, seems to be doubted by some of the Judges, and there is no certainty as to the course which should be adopted with reference to these reports.

Interpleader.—For some time it has been thought that Local Judges and Local Masters should have power to grant interpleader orders where the goods in respect of which interpleader is sought are situated in their county. Their power at present only extends to the case where the action, out of which the interpleader grows, is brought in their county. Frequently, of course, goods are seized

(*a*) *Raymond* v. *Little*, 13 P. R. 364.

in a different county from that in which the action is instituted. The Sheriff should be able to get his interpleader order without leaving his county for it, and it is proposed to amend Rules 41 and 138 to cover the case mentioned.

Infants.—The insertion of a useful new rule after 137 is suggested. Some Masters make a point of finding and reporting the ages of children in infancy proceedings before them, others do not, and frequently great difficulty arises after a lapse of years in proving majority. It seems an excellent idea to compel all Masters to certify as to the age of infants in their reports, and no doubt it will be found to save much trouble subsequently.

Accountant's Office.—These pages have contained from time to time criticisms of the system of book-keeping adopted in the Accountant's office. The most important reform advocated has been the opening of an account for each person to whose credit an ascertained sum has been directed to remain in Court. The committee comes to the conclusion that this is practicable; certainly there can be no doubt of its desirability. Rule 144 is amended by the insertion of a clause directing that separate accounts of the nature indicated should be kept. If the rule is passed, and the system it provides for put into operation, the result will be that the beneficiary will be able to tell at a glance how much money stands to his credit. One hardly dares to hope that anything so contrary to the traditions of the Accountant's office will ever come to pass.

Rule 172 is altered to allow a Judge of the High Court to direct any officer of the Court to sign cheques in place of the Accountant and initial them in place of the Chief Clerk in the case of the absence of these officers. This is to meet a difficulty which occasionally occurs, and when it does occur is serious enough.

There is an alteration of one word proposed in Rule 174 which may not be acceptable to the Accountant's office; the effect of it is to postpone the last day on which cheques can be præciped before vacation from the 20th to the 30th of June. If we can preserve our legal vacation of two months

it is as much as can be hoped for, and it seems entirely unreasonable that one of the public offices at the Hall should be closed as regards one of its most important functions for ten days longer. The profession is restive under this state of affairs, and if their wish is not acceded to may demand something much more distasteful, namely, that the Accountant shall attend to his duties during the months of July and August.

A useful amendment is proposed to be effected by inserting a rule after 193 directing the Accountant, upon any mortgage being paid off, to sign a proper discharge of it on the same being tendered for execution, and on production of the Accountant's certificate showing payment. This would do away with the unnecessary expense of an order under these circumstances.

Service out of Ontario.—Two important changes in Rule 271 are proposed. Clause (*f*) of that rule is altered to read. "when any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done, or is situate within Ontario." This is fuller and more explicit than the present clause.

By what was apparently an oversight when the rules were consolidated, one class of cases in which service out of the jurisdiction was formerly allowed, was omitted. The committee proposes to re-introduce the former practice by adding a new clause to the following effect:—"Where the action is upon a contract or judgment, though the same be not within any of the classes already enumerated, but it appears, to the satisfaction of the Court or a Judge, that the defendant has assets in Ontario of the value of $200 at least which may be rendered liable to the judgment in case the plaintiff should recover judgment in the action." This new clause, with a number of other valuable suggestions adopted in the report, emanated from the late Master in Chambers whose exertions in the direction of ameliorating the practice were so unwearied and so valuable.

After Rule 271 it is suggested that a new rule in the following words be inserted:—"In any case under the preceding rule where the defendant out of the jurisdiction,

whether a person or partnership, has a recognized place of business or agent empowered to carry on such business within Ontario an ordinary writ of summons may be served upon the manager of such business or such agent within Ontario." This is to effect in the case of business firms and private individuals what is already effected with regard to corporations. For example, John Smith is a tea merchant in London, Eng. He has an agent in Toronto who carries on his business here. A suit arises out of the failure of that agent to perform a contract entered into on behalf of his principal. The committee is of opinion that under such circumstances the service of a writ of summons upon the agent in Toronto ought to be good and sufficient service upon John Smith. The contract was really made and broken here, and unless strong reasons exist rendering it desirable it ought not to be necessary to effect service in a foreign country as the first step in the action.

Limited defence.—After much consideration it was thought that Rule 299 might profitably be altered, to allow the plaintiff, where defence is limited to amount only, to take an account in actions other than mortgage actions before the officer with whom judgment is to be entered, and thereafter to enter judgment. The proposed rule indicates the manner in which this is to be done.

Third parties.—Most practitioners have at one time or another met with difficulties under the third party rules. These rules, while apparently very broad, have in practice been narrowed to an extent which prevents them from applying to cases where they might usefully be brought into operation. As the matter now stands, there is no means whereby a defendant can recover a judgment against a third party in the same action in which the question between the plaintiff and defendant is decided. The common form of order gives the third party liberty, if he choose to do so, to defend the defendant against the plaintiff, and the only judgment which can be pronounced in favour of the defendant as against the third party is that the third party shall be precluded in any sub-

sequent litigation from impeaching the recovery of the plaintiff against the defendant. Section 531 of the Municipal Act contains a useful extension of the third party principle in cases which fall under its provisions. The English third party rules cover all cases. It is proposed to adopt these as they stand. If they are so adopted, the result will be that where it can be done without injury or delay to the plaintiff, the defendant can in the same action have the questions between himself and the third party disposed of, and can recover a judgment against the latter.

The proposed new rules also contain a simple provision for the disposition of questions between co-defendants where injury or delay will not thereby be occasioned to the plaintiff in the main issue. This is regarded by the committee as among the most important and useful amendments contained in the report.

Demurrers.—A radical and important change is suggested with regard to demurrers. Under the English system these no longer exist. The English Rules upon the subject are extremely simple. They authorize any party to raise by his pleading any point of law, which, being so raised, shall be disposed of by the Judge who tries the case at or after the trial unless by consent of the parties or by order of the Court or Judge on the application of either party the same is brought on for an earlier hearing. Should the point of law be brought to an earlier hearing under these provisions, and if its decision substantially disposes of the action, a judgment upon the whole action may then be pronounced. These rules it is proposed to introduce.

It may be mentioned that during the recent revision of the practice in British Columbia the Attorney-General made particular enquiry as to why the system of demurrers was retained in Ontario when the Consolidated Rules were passed. No satisfactory answer being afforded him, the English practice was adopted. It is to be hoped that the Judges will decide to do away with our cumbrous and antiquated practice, and to introduce these rules which

must save to litigants much time and expense, and which in England are found to work smoothly and well.

The last of the four English Rules on this subject is to the following effect: "The Court or a Judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action being shown by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed or judgment to be entered accordingly as may be just." This is an important advance on the present practice as to striking out pleadings. Practitioners know the danger of moving under our rule. They are liable to be told that the portion of the pleading complained of is bad in law and accordingly demurrable and not to be dealt with on such a motion. Now, no pleading which is properly available to a party is embarrassing; and a pleading not properly available must be bad in law and therefore demurrable. Where is the distinction to be placed between pleadings which are demurrable and pleadings which are embarrassing? If there be such a distinction, it must be a fine one as portions of pleadings have been struck out as being embarrassing and subsequently reinstated by a higher Court for the reason that they were demurrable—it being conceded that by the fact of their being demurrable they were also rendered embarrassing. The English Rule allows a motion to be made against a pleading when it discloses no reasonable cause of action or answer. This is much wider than our own rule, and apparently allows a pleading to be moved against where it is embarrassing by reason of the fact that it contains matter not available to a party. The power conferred by this rule and those preceding it, would be most effective in limiting pleadings to their proper and reasonable scope.

Pleading.—Critics of our judicial system have for some time past been drawing towards one of two conclusions,—either that the system of pleading should be amended or that pleading should be abolished altogether. One of our Judges, who is noted for getting speedily at the heart of

any controversy before him, has recourse to a species of oral pleading as a means of defining the issue. Other Judges openly declare that they pay little or no attention to the pleadings. Amendments at the trial are made with such liberality that the entire scope of an action may be thereby changed. It is really little exaggeration to say that a plaintiff may issue a writ for specific performance, in his statement of claim ask for the construction of a will, and at the trial recover a judgment giving him damages for the seduction of his daughter. Perhaps these things are as they should be; but certainly they are a wide departure from the old fashions of pleading. Our rules provide for a much stricter system, and the Bench is largely responsible for the present looseness. It is vain to inveigh against this state of affairs, and in the next breath to say that after all pleadings are not of much account, and should be nearly, if not altogether, disregarded. Of course, if pleadings are disregarded it cannot be expected that they will be drawn accurately and according to rule. If the Judges who sigh out their *quantum mutatus ab illo* were to use the pruning knife instead, an improvement would show itself at once; carelessness and slovenliness would no longer be on a par with accuracy and precision.

The Committee believe that the time has not come for abolishing pleadings and returning to the oral pleadings of many hundred years ago, and that the English system, as it at present exists, is as satisfactory a one as has been devised. The committee accordingly recommends the adoption of the English rules *in toto* in place of the Consolidated Rules covering the ground. The amendment is an immensely important one and deserves the attentive consideration of the bench and profession alike. It would be useless to adopt it, however, unless the Judges intend to enforce the rules and to regard pleadings as statements of action or defence which bind the parties unless under exceptional circumstances.

The most important variations which would be thus introduced are those arising out of the provisions that facts are denied at the peril of the party, and that allegations

not denied specifically or by necessary implication are to be taken as admitted. In addition, these rules compel greater definiteness and precision and expressly discountenance disingenuous pleading.

Service by posting up.—Before the consolidation, where a defendant was duly served with a writ and did not appear, service could be subsequently effected upon him by posting the document in the proper office. By oversight this provision was omitted from the Consolidated Rules. It is proposed to reinstate it, and thus render unnecessary the orders which have now continually to be obtained providing for a mode of service where a defendant has not appeared.

At present the Christmas Vacation is a vacation little more than in name, as time runs during it for pleading, appealing, etc. The Committee suggests that the Christmas Vacation should be put on the same footing as the Long Vacation, and also that appeals to a Judge in Chambers should be included in the class of matters mentioned in Rule 484 in respect of which time does not run during vacation.

Discovery.—Many diverse opinions are held upon the subject of discovery. It is incontestable that many examinations for discovery are held unnecessarily, or prolonged and rendered unduly expensive. Some of the Judges for this reason declare themselves opposed to the whole system. It seems, however, that a simple remedy for this is to hand—a remedy which would cure the evils complained of. Let any such examination, whether improper or of undue length, be passed by direction of the Judge before whom it comes, through the cleansing fires of the Taxing Office. Solicitors will speedily learn brevity if they are not paid for prolixity. But clearly it would be a retrogression to abolish or restrict discovery,—rather should it be extended with, of course, all proper safeguards. The common sense of the matter seems to be that the person who can give the information should be examinable. In the case of corporations this state of affairs is nearly attained, though some times it takes the highest court in the province to determine whether the driver of a bob-tail

car or the engineer of a traction engine is "an officer of the company." Of course it is only because of the language of the present rule that such fine discrimination becomes necessary, and at least one Judge of the Court of Appeal has expressed himself as of the opinion that the real criterion ought to be, is the person whom it is sought to examine, the person who can best give evidence with regard to the matter? Once concede that a party is entitled to discovery, surely he ought to get what is really discovery, whether the person who can give it to him is the mayor of a city or the humblest street-scraper in its employ.

This reasoning applies in the case of individuals as well. It happens not infrequently that the party to the action is absolutely ignorant of the facts in question,—for the reason perhaps that a contract has been made through an agent, or that some person in his employment is responsible for a damage complained of. Why, in that case, should either party have to rest content with the statement under examination, "I know nothing whatever of the matter personally, my agent or clerk or workman is the only one who has any knowledge of it." The committee believes that with proper restrictions and limitations the party seeking discovery should under these circumstances be able to obtain an examination of such agent, clerk or workman, and has inserted a rule after rule 488 conferring this right upon special application and at discretion.

In connection with examinations and commissions, the committee has thought it well to legalize the employment of shorthand writers. Under the decisions at present a shorthand writer can only be used by consent of the parties. This puts an unreasonable power in the hands of anyone who, for some collateral purpose, desires to have an examination delayed or prolonged. The times move too quickly for longhand examination, and, as is well known, they often fail to attain the object for which an examination is conducted.

Production.—A difficulty occasionally arises where it becomes necessary to compel the production of books or docu-

ments from a person not a party to the action for use upon preliminary examinations. There is no rule or practice under which production can be enforced, and it is proposed to insert a rule after 566, authorizing the Court or a Judge to make an order for this purpose where it appears to be necessary.

There has been a good deal of divergence of opinion as to whether, under the rules as they stand, an affidavit can be used as evidence if the adverse party desires to cross-examine upon it, without permitting him such cross-examination. The former practice reposed a discretion in the Judge. The present rules seem to give none. It is conceded that the former practice was better, and rule 577 is amended to re-introduce it.

Counterclaim.—Rather a curious state of affairs has occasionally arisen under the rules respecting counterclaims. The committee suggests a rule (640*a*) to meet the difficulty, which will better appear from an example. A. has a claim against B. which B. concedes is valid. B. has a claim against A. to an amount in excess of A.'s claim against him. This claim A. refuses to recognize. A. is worthless, B. is solvent. B. has nothing to gain therefore in suing A. He offers to set off the claims. This A. refuses. A. brings action against B. B. sets up by way of defence his cross claim against A., but desires to take advantage of the fact that he has offered to set off before action. The rule forbids him to plead a tender without bringing the money into Court. If he brings the money into Court, A. can take it out in satisfaction and tax his costs. B. accordingly is unable to take the benefit of his position and must go down to trial. At the trial A. recovers judgment against B. with costs. It is true that B. recovers a cross-judgment against A. with costs; but this only avails him as a set-off, A. being insolvent, and very likely the set-off is partially prevented by the intervention of a solicitor's lien. In any case B. has to pay his own costs. It will be seen therefore that although B. has taken a perfectly reasonable position from first to last, and has offered A. throughout the amount of his claim or its equivalent by way of set-off, that what-

ever course he takes he finds himself at the last mulcted in costs, and probably out of pocket as regards part of the subject matter of the litigation. This is not a fanciful case; it has actually occurred, and not improbably will occur again. The object of the proposed rule is to allow the B. of our example to apply to the Court or a Judge for leave to plead the tender of a set-off without bringing the money into Court.

Cases very frequently arise where actions are commenced in the High Court, but by reason of admission of liability, or of judgment having been obtained for a portion of the claim, or by reason of admitted counterclaim, or set-off, the matter in dispute is brought within the proper competence of a lower court. The committee has drawn a rule (652a) allowing an application, under circumstances of this kind, to transfer the action to the proper court.

Exhibits.—Of the smaller vexed questions, perhaps that with regard to exhibits, has occasioned as many heart-burnings and bickerings as any. It is the custom in the Chancery Division to hand out exhibits immediately after trial and to give them to the persons who deposited them in court. The occasional result is that exhibits thus get into the wrong hands, because documents so put in sometimes become the property of other persons by virtue of the judgment in the action. A more frequent result is that exhibits are not to be found where they became wanted for use in an appeal. The Common Law Divisions, on the other hand, refuse to part with exhibits without an order. The committee has thought that in case of an appeal the exhibits should remain in the custody of the court, unless otherwise ordered. If the case is not to be carried further then they may be handed out, on notice to the other party, or on consent.

Settling judgments.—Practitioners living out of Toronto complain that it is inconvenient to have judgments in cases other than Toronto cases settled at Toronto. It is suggested with a good deal of force that judgments should be invariably settled at the place where the action is tried,

and before the officer who then presided in Court, and that the criterion ought not to be the place where the judgment happens to be delivered. Rules 759 and 761 have been altered to effect a change in this respect.

Court Orders.—It is rather singular that the Consolidated Rules contain no provision for the drawing up and signing of Court orders, and deal with judgments alone. A new rule (764a) is suggested to supply this omission, and it may be mentioned that it authorizes the Clerk of Single Court to himself sign orders made in Single Court. He is, of course, the only officer who has knowledge or record of such orders and he should sign them. In this respect his position is quite analogous to that of the Clerk in Chambers. The proposed new rule also provides that the Judge may himself sign any order. Circumstances of urgency occasionally arise when it is impossible to have an order signed and entered in the usual course, and it seems absurd that the Judge who makes an order should not have the power to give it effectiveness.

The vexed question as to the entry of Court orders is dealt with by making Rule 772 read, "every judgment and Court order of a special nature shall be entered at full length in a book to be kept for that purpose." Attention has been called to the divergency of practice between the Divisions in this respect. In the Chancery Division every Court order is entered in full, while elsewhere the case is otherwise, the result being that if the original happens to be lost it is sometimes impossible to issue a duplicate.

Security for Costs in Appeals.—Where a party is under an obligation to give a bond as security for costs, he is permitted by Rule 1248 to pay into Court, without special order, a sum not less than half the penalty of the bond in lieu of giving such bond. It is proposed to extend this provision to bonds given to secure the respondent's costs in the Court of Appeal. Where the bond is given to secure the amount of judgment and costs in the court below, the appellant is authorized under the same proposed rule (807*a*) to pay into Court an amount equal to such judgment and costs.

County Court Appeals.—The rules as to County Court appeals do not work satisfactorily. It is not fair that an appellant should have power to compile the appeal book to suit himself and without reference to the respondent. The committee considers that the case should be settled in County Court appeals in the same manner as in High Court appeals, and that reasons for and against appeal should be delivered in like manner.

Appeals from Local Judges.—The time limited for appealing from orders of the Master in Chambers or Local Judges or Masters is nine days. Where the decision complained of is given on Thursday and the case is in the Chancery Division, this time is too short. It does not admit of communication between a Toronto agent and his principal. Were the time extended to ten days, it would be sufficient for this purpose, and the committee makes this alteration. Provision is also made for the case when the day upon which the Judge's Chambers is held falls upon a holiday, by directing that motions returnable on that day, may be brought on on the next regular day upon which such motions could be heard without special leave.

Judgment Debtors.—There is probably no doubt in the mind of any one that Rule 934 coupled with 926 was intended to confer the right of cross-examining a judgment debtor upon a judgment for costs alone. They fail of this object, and an amendment of them is very desirable. Rule 926 is altered in such a manner as to put its meaning beyond doubt.

Inspection of Property.—Rule 1135 authorizes an order being made "for the detention, preservation or inspection of any property being the subject of the action." Very often the property of which inspection is material is not "the subject of the action." The late Master was several times met with this difficulty and suggested that the language should be modified to read, "for the inspection of any property, the inspection of which is necessary to the proper determination of the question in dispute."

Interpleader in County Courts.—The rules with respect to interpleader in County Courts are involved and fail to meet all cases. They have been altered—again in accordance with the suggestion of the late Master—to cover the omitted cases, and also to authorize the sending of an issue to the Division Court where the amount of the execution or the value of the goods does not exceed $100.

Costs of Procuring Evidence.—Rule 1216 deals with taxations and comes originally from the English rule, but omits one clause therein contained. As matters now stand, none of the costs of procuring evidence can be taxed, yet such costs are just as necessary disbursements as any others in connection with the prosecution of a suit. The committee recommends that a clause should be added to the rule mentioned, authorizing the allowance on taxation of the costs of procuring evidence in proper cases..

Security for Costs.—The English practice with regard to security for costs was at one time very nearly in the position of our own, but a rule was passed to cover the case of a plaintiff ordinarily resident out of the jurisdiction but who is temporarily resident within the jurisdiction. Under the present English practice such a plaintiff can be compelled to give security for costs. Under our own practice, a return to the jurisdiction or a temporary residence defeats the application. It is thought desirable to introduce the English rule.

In this rapid review, only a few of the more important proposed changes are mentioned. There are a large number of minor alterations which, in their way, are not less important. The suggestions which give rise to them have come from a variety of sources, and the report is therefore the product of many minds. Nevertheless, it is extremely likely that there are many other matters which need attention, and any member of the profession will do a service to himself and his brother practitioners by transmitting the suggestions which may occur to him to the committee. It is almost always in the course of practice that imperfections become apparent—rules which read smoothly enough, may be found when put into operation to be very ill-adapted

to their purpose. As was suggested at the opening of this article, the only entirely satisfactory course is a complete revision and reconstruction of the practice; in fact, much of it yet remains to be constructed. If this should be brought to pass, it is important that as wide an interest as possible should be taken in the matter, and that all practitioners who have encountered defects or who have suggestions for amelioration should communicate their ideas. To bring this to the notice of the profession is the chief purpose of this article.

The tariff.—Before leaving the subject it is well to devote a little space to the alterations which the committee suggests should be made in the tariff.

So long as costs are considered in the light of an indemnity to the successful party, the scale upon which those costs are to be taxed should approximate at least to the extent of the outlay. To instance a clear example of failure in this respect, consider the fees allowable on appeals to the Court of Appeal. The limit, as every one knows, is $80 to first counsel and $40 to second counsel. Cases of the utmost importance come before that Court and last for several days, or even for a week or longer, and yet there is no variation of the fee. No one could for a moment suppose that the sum of $80 is an adequate remuneration in an appeal where the argument occupies a week, not to speak of the time spent in preparation. If, then, costs are an indemnity, nothing can be clearer than that there should be an increase. In the same case in the court below fees of many hundreds of dollars may be allowed. Why in the higher court should a successful litigant be called upon to pay out of his own pocket a much larger proportion of his expenses? No doubt a good deal is to be said in favour of the American system under which a successful party only recovers his "fee-bill"—a trifling amount for court expenses—and pays his own attorney's costs. The practice is said to work well, and very likely it is worth considering whether it should not be introduced; but the half-and-half system cannot but be unfair. It is to be hoped that the Judges will see the matter in this light.

The committee points out that time and money is saved in the majority of cases by allowing solicitors to serve writs and subpœnas. To such an extent is this the case that notwithstanding the fact that they can tax nothing for it, solicitors very frequently do effect these services. In view of the tendency to remunerate Sheriffs by fixed salary, items 16, 17 and 18 of the tariff ought, in the opinion of the committee, to be altered.

The anomaly at present exists that more can be taxed for a statement of defence of say 15 folios than for a statement of defence and counter-claim of the same length. These documents should be treated as separate pleadings and the items of the tariff altered to allow reasonable fees for them as such.

The committee considers that instructions for reasons for or against appeal are as proper as instructions for pleadings, and that perusals of the same should be allowed as well, also that provision should be made for preparing bonds to secure costs in appeal.

The items in the tariff grouped under the head of "Notices" have been re-arranged, and the taxable fees have been made more appropriate to the services rendered.

A charge should be allowed for perusal of affidavits on production, also for attending to search bonds, and the amount taxable for copies of orders ought to stand on the basis of all other copies and be ten cents per folio.

There should be power, in special and important cases, to allow two counsel fees on motions before a single Judge or the Divisional Court.

The fee taxable on arbitrations, when costs are upon the lower scale, is limited to $25. Such arbitrations sometimes necessarily last for several days, and the sum named is entirely inadequate.

Neither the Rules nor the Tariff at present authorize Local Masters or Local Judges to grant fiats on Chamber motions before them. This power is confined to the Master in Chambers and the Master in Ordinary. It would be inexpedient to carry the rule into effect as it stands, and

it is suggested that Local Judges and Local Masters should have the power in cases before them to grant a fiat not to exceed $5, and that the Taxing Officer at Toronto should have power to increase this fee where he considers the circumstances warrant it. It is safe to say that in nineteen Chamber applications out of twenty $5 is an adequate remuneration. The altered item would therefore not render many applications to Toronto necessary, and in any case it is better than the present provision, which is entirely disregarded and indeed incapable of being satisfactorily complied with.

Item 155 deals with the fees on appeals to the Court of Appeal, and has been mentioned. It is proposed to leave these in the discretion of the Taxing Officer.

There is no provision for an allowance on the settlement of issues. This appears to be a *casus omissus* from item 158, and the omission is supplied.

W. H. BLAKE.

EDITORIAL REVIEW.

Amendments to the Rules.

We print this month an exhaustive account of the proposed alterations in the rules. It will be seen from our contributor's account that the proposed amendments are divided into three classes. First, there are omissions arising from over-sight at the consolidation. Secondly, improvements are suggested from the experience derived from too narrow or too large a construction of existing rules; and thirdly, amendments are suggested as necessary, because of the indisposition of the Bench to carry out the scheme of the consolidation as to fusion of offices.

While we must always hail with delight any improvement which experience shows will smooth the way of a litigant in advancing to the trial of his action on the merits, we must protest against going backwards from the scheme of consolidation. An attempt was made to codify the practice—to have one system for all branches of the Courts, as there is in reality one court only. How that has been frustrated merely by the passive resistance of those whose assistance is necessary to carry it out is well-known. In the end it will no doubt come, but old traditions and customs die hard.

It is a good suggestion that, now that a thorough discussion of the rules has taken place, the whole consolidation should again be reviewed and reduced if possible to a code of practice.

Admission of Women.

By a vote of 12 to 11 the Benchers resolved to admit women to practice as solicitors. The vote we believe does not represent the opinion of the profession, nor for that

matter, the real opinion of the Benchers, some of whom voted either out of compliment to the Attorney-General, or because they thus got rid of what was likely to prove a troublesome question.

The fact is that the majority in the Legislature was very small. The question was shelved there by giving the Law Society power to admit, and the Attorney-General used his persuasive powers to induce the Benchers to take the responsibility on themselves of a radical change in the law.

The question is not one of the mere domestic affairs of the Law Society. It is an extensive and radical question of politics, and ought to be so treated. If the responsibility is cast upon the Benchers, who themselves are but a representative body, it is certainly taking a great responsibility upon themselves for twelve out of thirty elective Benchers to make such a radical change in the government of the Law Society without taking the sense of the Profession upon it. We feel confident that the good sense of the Profession is against the measure. To argue that many women practise law in the United States is of no avail. Monkeys are mimetic. Men should act upon reason and judgment.

BOOK REVIEWS.

The Law of the Canadian Constitution. By W. H. P. CLEMENT, B.A., LL.B. (Tor.), of Osgoode Hall, Barrister-at-Law. Toronto: The Carswell Co. 1892.

The advent of this able work on the Constitution of Canada marks an era in the history of constitutional study. The subject is one of perennial growth, and from very crude notions of our scheme of government, there have grown up propositions now well established by the supreme authority of the Judicial Committee of the Privy Council, which have largely extended their operation and effect beyond the actual individual cases. In many cases we have seen in the past quarter of a century, able and apparently well considered views completely changed, and opposing theories substituted therefor. It is not to be expected then that the subject is yet at rest, though long strides have been made in the acquisition of constitutional knowledge.

Mr. Clement has struck out for himself a treatment of the subject not hitherto attempted, though some of the views which he so ably presents have appeared before in disconnected essays and magazine articles. He sketches the whole political system of the Empire, treats of the constitutional origin of the various British North American Colonies, reviews their constitutions, discusses the sources and origin of English law in the Provinces, and shows what laws are in force. From that he proceeds to the Union, and thence to the cases on the construction of the British North America Act. It is by far the most complete and comprehensive work yet attempted. While commending most heartily the general result of his industry we venture to discuss, as well as we can, some of the positions taken.

The first chapter is devoted to our political system, and he arraigns Professor Dicey, as he has before been arraigned, for his statement that the Constitution of Canada is proclaimed with "official mendacity" to be like that of the

United Kingdom, the truth being, according to Professor Dicey, that it is more like that of the United States. Mr. Clement claims for the Empire a "federalism," resting not on a written constitution, but upon convention and growth —the Imperial Parliament, being at the same time "national," in that it legislates for the whole Empire, and local in that *prima facie* it legislates for the United Kingdom only. Waiving the misuse of the word "federal," which etymologically has a different signification, that proposition is partly true, and true by growth and convention and not by design, in which it differs essentially from the Constitution of the United States. But a more important difference exists, viz., that the national legislature of the United States is limited as to the topics upon which it may legislate, while the Parliament of the Empire is not. Congress therefor is more truly a federal legislature, exercising its powers by consent and convention and is bound thereby, while the Parliament of the Empire exercises its functions of right and is bound by no limitation. Congress, again, is limited in its mode of dealing with certain subjects. It may not pass a law *ex post facto*, or one impairing the validity of a contract, or one which deprives the citizen of his property without compensation. The Parliament of the Empire is unlimited in power as well as in the extent of its jurisdiction. Congress therefore is not Supreme. Austin (Lect. Jur. 268) describes the Government of the United States as merely a "subject minister of the united states' Governments." Whether that be a true description of them or not, still Congress, and of course the Executive of the United States, while supreme in a sense, are habitually obedient, to use another of Austin's expressions, to the Constitution conferred upon them by their originators. On the other hand the Parliament of the Empire, as Mr. Clement points out in another place, may make the Constitution for the Empire. While we do not for a moment suggest that this is not all well understood by the author, we mention it in protest of the use of the word "federal," which ,originally founded on the treaty of the independent States, is now used for all purposes of explaining the inter-

relationship of composite states. The description of the Imperial system is well enough done without the use of this term; and after all, there is no analogy between that system and that of the United States.

While in its artificial sense, then, the Empire may possess a federal system, the local legislatures are emanations from the Parliament itself. They are all statutory, as is also pointed out in another place. Subject, however, to these qualifications there is, as well and ably explained, a large, wholesome, and adaptive system of local legislatures in touch and harmony with the national government, the whole being subject to the national legislature, the Parliament of the Empire.

While this relationship exists between the Canadian, and other subordinate law-making bodies of the Empire on the one hand, and the parliament of the Empire on the other, the analogy might have been carried still further with regard to the legislatures of Canada alone. A Provincial Act necessarily comes before the Governor-General in Council, who upon the advice of his responsible ministers for the time being, must either allow it to remain law, or disallow it. If he disallows it on advice, the ministers who gave him the advice must if called upon justify it to the Parliament of Canada. Thus the policy of a local Act may finally be submitted to the people of Canada at large, just as the policy of an Act of a colony might by possibility engage the attention of the people of the United Kingdom, if disallowed by the Queen-in-Council, whose advisers for the time being would be responsible to the electors of the United Kingdom. In either case the tendency would naturally be in favour of the local policy, as public feeling makes more and more in that direction. The principle, however, remains.

We cannot agree, morever, with Mr. Clement's application of the term "local" to the Imperial Parliament though it habitually acts upon affairs of the United Kingdom only. For the affairs the Kingdom are essentially the affairs of the whole Empire; and though he is careful to note that it is so used in a limited sense only, the use of

the word is so well established in its restricted sense, that it is entirely improper in a theoretical discussion Not even by convention is it local in the exercise of its functions; for with respect to shipping, copyright, and even bankruptcy its statutes are directly applicable in the colonies in many respects—a point more clearly explained in the chapter on the Imperial Statutes affecting Canada.

The continuity of the old constitutions of the provinces is contended for, and an incisive argument is advanced to establish this. At present it is not easy to see how this can be of any moment, and it is not practically applied. It does not establish anything with regard to the division of the legislative power, and the executive power is shown to be divided by analogy to the distribution of legislative powers. In any event the British North America Act is a new departure from an old system of government, and all powers now possessed by the legislatures and included in the constitution are derived from that Act itself.

More emphasis, we think, should have been laid on the fact that the canon law of England is not in force here. A very able chapter on the sources of our law and the introduction of English law omits to make this clear. *Hodgins* v. *McNeill*, 9 Gr. 309, is cited as to the introduction of the Marriage Acts, and the passage of V.C. Esten's judgment in which he expresses the opinion that the canon law was also introduced, is passed unchallenged, though *Re the Bishop of Natal*, 3 Moo. P. C. N. S. 115, decided about two years thereafter, shows the incorrectness of this opinion.

The status of the Governor-General is well described, as well as his liability for acts done either in his private capacity or *qua* Governor. In connection with the proposition that "a Governor may by one and the same act incur civil or even criminal liability, and win the approbation of his Imperial superiors," *Baird* v. *Walker*, L. R. 1892, A. C. 491, might have been effectively cited. if it had not been published too late for reference in the text. The judgment appealed from and affirmed, however, appeared in 11 Occ. N. 223.

The cases cited on the powers and restrictions of colonial Governors are mainly, if we mistake not, cases of Governors of Crown colonies. Where there is a legislature in the colony and a form of government given by a constitutional Act, the powers of the Governors must be largely determined by the Act and not by his commission and instructions.

In Mr. Clement's description of the colonial legislative power, while he correctly describes the position of a local legislature as occupying in a plenary manner, as fully as the Imperial Parliament could do, the sphere of legislation confided to it, it is a mistake to speak of it as "supreme" as he does at p. 177. The expression is not justified by the authorities, and perhaps was not intended to express all that it implies.

On the whole we congratulate the author on this very welcome work.

The Law of Evidence. By SIDNEY L. PHIPSON, M.A. (Cantab.), of the Inner Temple, Barrister-at-Law. London: Stevens & Haynes. 1892.

An admirable, compact little book of four hundred pages, in which the author states the rule, the analysis of it, and follows up with examples of the application. The methodical way in which it has been compiled, and the lucid arrangement aided by the mode of printing it, will make it most convenient for reference. It is more than a digest and less than a treatise. It affords all the advantages of a digest, and without being discursive, many of those of a text book.

A Manual of Medical Jurisprudence and Toxicology. By HENRY C. CHAPMAN, M.D., Professor of Institutes of Medicine and Medical Jurisprudence in the Jefferson Medical College of Philadelphia, etc., etc. With thirty-six illustrations. Philadelphia: W. B. Saunders. 1892.

As an elementary practical or introductory book this little work will find its place. It comprises the lectures delivered by the author and the result of his experience as a coroner.

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THE

CANADIAN LAW TIMES

NOTES OF CASES.

AND

INDEX-DIGEST FOR 1892.

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VOL. XII.

TORONTO:

THE CARSWELL CO. (LTD.), PUBLISHERS,

1892.

Entered according to Act of the Parliament of Canada, in the year one thousand eight hundred and ninety-two, by THE CARSWELL COMPANY Limited), in the office of the Minister of Agriculture.

THE CANADIAN LAW TIMES

OCCASIONAL NOTES.

Supreme Court of Canada.

ONTARIO.] [22ND JUNE, 1891.

BARRY v. ROSS.

Contract—Construction of railway—Standard of quality—Evidence.

McC. and R. were the contractors for the construction of a part of the Grand Trunk Railway, and sublet the masonry work to B. & S. In a conversation between McC. and S. before B. & S. began their work, S. understood that the second class masonry in his contract was to be of the same quality as that of the "loop line," another part of the Grand Trunk road, and prepared his materials accordingly, on receipt of a letter from McC. instructing him to carry out his contract "according to the plans and specifications furnished by the company's engineer." After a small portion of the masonry work had been done, the sub-contractors were informed by the engineer in charge that the second class masonry required was of a quality that would increase the cost over thirty per cent., whereupon they refused to proceed until McC., who was present, said to them "go on and finish the work as you are told by the engineer and you will be paid for it." They thereupon pulled down what was built, and proceeded according to the directions of the engineer. When the work was nearly done, McC. tried to withdraw his offer to

pay the increased price, but renewed it on the sub-contractors threatening to stop. After completion of the work, payment of the extra price was refused and an action was brought therefor.

Held, affirming the judgment of the Court of Appeal, that the conversation between McC. and S. prior to the commencement of the work, as detailed in the evidence, justified the sub-contractors in believing that the standard of quality was to be that of the loop line; that the promise to pay the increased price was in settlement of a *bona fide* dispute, which was a good consideration for such promise; and that B. and S. were entitled to recover.

Bain, Q.C., and *Laidlaw*, Q.C., for the appellants.

Osler, Q.C., for the respondents.

FITZGERALD v. GRAND TRUNK RAILWAY COMPANY.

Railway company—Construction of line under charter—Money advanced and control exercised by another company—Liability of latter as to it—Tort-feasors.

In an action against a railway company for damages caused by the building of an embankment along a line of railway which cut off access to the highway from the plaintiff's land, the defendants contended that the line of railway was built by and under the charter of another company; that there was no statute authorizing them to build it, and its construction by them would be *ultra vires*; and that even if the officers of the defendants were also officials of the company constructing the line, and the plaintiff had sustained damage by its construction, the defendants, as a corporation, could not be made liable therefor. On the trial the evidence showed that the defendants had advanced the money to build the line; that its president and other directors owned nearly all the stock in the chartered company;

and that the work was done under the control and direction of the defendants' engineers.

Held, affirming the decision of the Court of Appeal, that the defendants were liable to the plaintiff as wrongdoers.

W. Cassels, Q.C., for the appellants.

E. B. Edwards, for the respondent.

BRANTFORD, WATERLOO, AND LAKE ERIE R. W. CO. v. HUFFMAN.

Bond — Condition of—Consideration — Liability—Contract — Tender for— Acceptance.

H., in response to an advertisement therefor, tendered for a contract to build a line of railway for the defendants, and his tender was accepted by the board of directors of the defendants, subject to his furnishing satisfactory sureties for the performance of the work and depositing in the Bank of Montreal a sum equal to five per cent. of the amount of his tender. H. subsequently executed a bond in favour of the defendants, which, after reciting the fact of the tender and acceptance, contained the condition that if within four days of the date of execution, H. should furnish the said sureties and deposit the said amount, the bond should be void. These conditions were not carried out and the contract was eventually given to another person.

In an action against H. on the bond :—

Held, affirming the decision of the Court of Appeal, 18 A. R. 415 ; 11 Occ. N. 296, that no contract having been entered into pursuant to the tender and acceptance, the bond was only a conditional agreement, for which there was no consideration, and H. was not liable on it.

Lash, Q.C., and *H. McK. Wilson*, Q.C., for the appellants.

Osler, Q.C., and *Harley*, for the respondents.

HEWARD v. O'DONOHOE.

Statute of Limitations—Possession—Tenancies in common—Caretaker of one tenant—Partition—Adverse possession as to co-tenants—Acts of ownership.

F. H. was the acting owner of certain land for some years prior to 1865, and O. was in possession under him as caretaker. In 1865, in a suit between F. H. and other members of his family, a decree was made declaring F. H. to hold as trustee for, and to convey certain proportions of the property to, the other members. O. continued in possession after this decree and took proceedings at different times against trespassers and others, but always represented that he did so by authority from F. H., and he did no act as asserting ownership in himself until 1884, when he fenced a portion of the land. In an action against O. to recover possession of the land:—

Held, reversing the judgment of the Court of Appeal, 18 A. R. 529; 11 Occ. N. 296, that the effect of the decree in 1865 was not to alter the relations between F. H. and O.; that O. having once entered as caretaker, and having never disclaimed that he held as such for the necessary period to gain a title by possession, his possession continued to be that of a caretaker and he could not retain possession of the land against the true owners.

Ryan v. *Ryan*, 5 S. C. R. 387, followed.

McCarthy, Q.C., and *Angus MacMurchy*, for the appellants.

James Reeve, Q.C., for the respondent.

In re SOLICITOR.

Solicitor and client—Præcipe order for taxation of bill of costs and accounting—Jurisdiction of taxing officer under—Inquiry relating to bills not referred—Agreement—Evidence of settlement—Appeal.

The executors of an estate took proceedings to obtain from the solicitor of the testator an account and payment of moneys in his hands due the estate. By an order obtained upon præcipe a reference was made to a taxing officer to tax the bills of costs produced by the solicitor and to take an account of all sums of money received by the solicitor of or on account of the applicants.

In doing so the officer, subject to protest by the solicitor, took evidence of an alleged settlement between the executors and the solicitor by which a fixed amount was to be paid the latter in full of certain older bills not referred to taxation. The officer having reported a considerable amount due from the solicitor to the estate, the solicitor appealed, urging that the order of reference did not authorize the officer to inquire into the validity of the alleged agreement, and that, as the older bills had been rendered more than a year before the proceedings commenced, they should in the accounting be allowed at the amount represented on their face. The officer's report was affirmed by a Judge in Chambers, by the Common Pleas Divisional Court, 12 P. R. 612, and by the Court of Appeal, 14 P. R. 317; 11 Occ. N. 295.

Held, affirming the decision of the Court of Appeal, that the taxing officer not only could, but was bound to, proceed as he did; and the appeal should be dismissed.

Quaere—As the matter in question relates only to the practice and procedure of the High Court of Justice for Ontario, and the conduct of one of its officers in carrying out an order of the Court, is it a proper subject of appeal to the Supreme Court of Canada?

The solicitor, appellant in person.

McCarthy, Q.C., for the respondents.

HAWKINS v. BICKFORD.

Appeal—Questions of fact—Interference with decision of trial Judge.

In an action for payment for services alleged to have been performed by H. on a retainer by B. to procure a subsidy from Parliament and bonuses from the municipalities of Sarnia and Sombra in aid of a railway projected by B., the giving of which retainer B. denied:—

Held, that the question for decision being entirely one of fact, the decision of the trial Judge, who saw and heard the witnesses, in favour of H., confirmed as it was by the Court of Appeal, should not be interfered with by the Supreme Court.

Lash, Q.C., for the appellant.

McCarthy, Q.C., and *H. McK. Wilson*, Q.C., for the respondent.

[17TH NOVEMBER, 1891.

In re GLENGARRY DOMINION ELECTION.

CHISHOLM v. McLENNAN.

Election petition — Re-service of — Order granting extension of time — Preliminary objections—R. S. C. c. 9, s. 10—Description of petitioner.

When this petition was first served, no copy of the deposit receipt was served with it, and the petitioner, within the five days after the day on which the petition had been presented, applied to a Judge to extend the time for service, that he might cure the omission. An order extending the time, subsequently affirmed on appeal by the Court of Appeal for Ontario, was made; and the petition was re-served accordingly with all the other papers prescribed by the statute. Before the order extending the time had been drawn up, the respondent had filed preliminary objections, and by leave contained in the order, he filed further preliminary objections after the re-service. The new list of objections included those made in the first instance, and also an objection to the power or jurisdiction in the Court of Appeal or Judge thereof to extend the time for service of the petition beyond the five days prescribed by the Act.

Held, that the order was a perfectly valid and good order and that the re-service made thereunder was a proper and regular service under R. S. C. c. 9, s. 10.

The petition in this case simply stated that it was the petition of Angus Chisholm, of the township of Lochiel, in the county of Glengarry, without describing his occupation, and it was shown by affidavit that there were two or three other persons of that name on the voters' list for that township.

Held, affirming the judgment of the Court below, 11 Occ. N. 266, that the petition should not be dismissed for the want of a more particular description of the petitioner.

McCarthy, Q.C., for the appellant.

S. H. Blake, Q.C., for the respondent.

QUEBEC.] [22ND JUNE, 1891.

OWENS v. BEDELL.

Conventional subrogation — What will effect—Art. 1155, s. 2 — Erroneous noting of deed by Registrar.

Conventional subrogation under Art. 1155, s. 2, C. C., takes effect when the debtor borrowing a sum of money declares in his deed of loan that it is for the purpose of paying his debts, and in the acquittance declares that the payment has been made with the moneys furnished by the new creditor for that purpose, and no formal or express declaration of subrogation is required.

Where subrogation is given by the terms of a deed, the erroneous noting of the deed by the Registrar as a discharge and the granting by him of erroneous certificates cannot prejudice the party subrogated.

Judgment below affirmed.

Butler, Q.C., and *Geoffrion*, Q.C., for the appellants.

Morris, Q.C., for the respondent.

[11TH NOVEMBER, 1891.

MOIR v. VILLAGE OF HUNTINGDON.

Appeal as to costs only—Supreme and Exchequer Courts Act, s. 24.

After the rendering of the judgment by the Court of Queen's Bench refusing to quash a by-law passed by the corporation of the village of Huntingdon, the by-law in question was repealed. On appeal to the Supreme Court of Canada:—

Held, that the only matter in dispute between the parties being a mere question of costs, the appeal should be dismissed: Supreme and Exchequer Courts Act, s. 24.

Appeal dismissed with costs.

Smith, for the respondents.

Mitchell and *Robertson*, for the appellants.

[17TH NOVEMBER, 1891.

COUNTY OF VERCHERES v. VILLAGE OF VARENNES.

Appeal—Jurisdiction — Action to set aside a proces-verbal or by-law — Supreme and Exchequer Courts Act, ss. 24 (g), 29.

The municipality of the county of Vercheres passed a by-law or *proces-verbal* defining who were to be liable for the re-building and maintenance of a certain bridge. The municipality of Varennes by their action prayed to have the by-law or *proces-verbal* in question set aside on the ground of certain irregularities. The judgment below was in favour of the plaintiffs.

Held, that the case was not appealable to the Supreme Court of Canada under s. 29 or s. 24 (g) of the Supreme and Exchequer Courts Act, the appeal not being from a rule or order of a Court quashing or refusing to quash a by-law of a municipal corporation.

The appeal was quashed with costs.

Allan, for the appellants.

Archambault, Q.C., for the respondents.

WINEBERG v. HAMPSON.

Appeal—Jurisdiction—Future rights—Title to lands—Servitude—Supreme and Exchequer Courts Act, s. 29 (b).

By a judgment of the Court of Queen's Bench for Lower Canada (appeal side) the defendants in the action were condemned to build and complete certain works and drains in a lane separating the defendants' and plaintiff's properties on the west side of Peel Street, Montreal, within a certain delay, and the Court reserved the question of damages.

On appeal to the Supreme Court of Canada :—

Held, that the case was not appealable.

Gilbert v. *Gilman*, 16 S. C. R. 189, followed.

The words "title to lands" in s-s. (*b*) of s. 29 of the Supreme and Exchequer Courts Act are only applicable in a case where a title to the property or a right to the title are in question.

Wheeler v. *Black*, 14 S. C. R. 242, referred to.

The appeal was quashed with costs.

Bethune, Q.C., for the motion to quash.

Robertson, Q.C., contra.

In re STANSTEAD DOMINION ELECTION. RIDER v. SNOW.

Election petition — Preliminary objections — Status of petitioner — Onus probandi.

By preliminary objections to an election petition the respondent claimed that the petition should be dismissed, *inter alia*—(14) because the said petitioner had no right to vote at said election.

On the day fixed for proof and hearing of the preliminary objections the petitioner adduced no proof, and the respondent declared that he had no evidence, and the preliminary objections were dismissed. On appeal to the Supreme Court of Canada, the counsel for the appellant relied only on the 14th objection.

Held, per RITCHIE, C.J., and TASCHEREAU and PATTERSON, JJ., that the onus was upon the petitioner to establish his status, and that the appeal should be allowed and the election petition dismissed.

Per STRONG, J., that the onus probandi was upon the petitioner, but, in view of the established jurisprudence, the case should be remitted to the Court below to allow the petitioner to establish his status as a voter.

FOURNIER and GWYNNE, JJ., contra, were of opinion that the onus probandi was on the respondent; following *The Megantic Election Case*, 8 S. C. R. 169.

The appeal was allowed with costs and the petition dismissed.

Geoffrion, Q.C., for the appellant.

White, Q.C., for the respondent.

NOVA SCOTIA.] [29TH OCTOBER, 1891.

In re KING'S COUNTY DOMINION ELECTION. BORDEN v. BERTEAUX.

Election petition — Preliminary objections — Service at domicil — R. S. C. c. 9, s. 10.

Held, that leaving a copy of an election petition and accompanying documents at the residence of the respondent with an adult member of his household, during the five days after the presentation of the same, is a sufficient service under s. 10 of the Dominion Controverted Elections Act, even though the papers served do not come into the possession or within the knowledge of the respondent.

The appeal was dismissed with costs.

Roscoe, for the appellant.

Boak, for the respondent.

MANITOBA.] [22ND JUNE, 1891.

LYNCH v. NORTH WEST CANADA LAND CO. MUNICIPALITY OF SOUTH DUFFERIN v. MORDEN. GIBBONS v. BARBER.

Constitutional law — B. N. A. Act, s. 91. — Interest—Legislative authority over—Municipal Act—Taxation—Additional rate for non-payment.

The Municipal Act of Manitoba, 1886, s. 626, as amended by 49 V. c. 52, provides that "in cities and towns all parties paying taxes to the treasurer or collector before the 1st day of December, and in rural municipalities before the 31st day of December, in the year they are levied, shall be entitled to a reduction of ten per

cent. on the same, and all taxes remaining due and unpaid on the 1st or 31st day of December (as the case may be) shall be payable at par until the 1st day of March following, at which time a list of all the taxes remaining unpaid and due shall be prepared by the treasurer or collector (as the case may be) and the sum of ten per cent. on the original amount shall be added on all taxes then remaining unpaid.

Held, reversing the judgment of the Court below, GWYNNE, J. dissenting, that the addition of ten per cent. on taxes unpaid on 1st March is only an additional rate or tax imposed as a penalty for default, and is not "interest" within the meaning of s. 91 of the B. N. A. Act, and so not within the exclusive legislative authority of the Dominion Parliament.

Martin, A.-G., and *Kennedy*, Q.C., for the appellants.

Robinson, Q.C., *MacTavish*, Q.C., and *Tupper*, Q.C., for the respondents.

[28TH OCTOBER, 1891.

In re BARRETT AND THE CITY OF WINNIPEG.

Constitutional law — Constitution of Manitoba — 33 V. c. 3 (D.) — Act respecting education—Denominational rights—Separate schools.

The Act by which the province of Manitoba became a part of the Dominion of Canada, 33 V. c. 3 (D.), gave to the Province the exclusive right to legislate in respect to education, with the following limitation, "Provided that nothing in such law (a law relating to education) shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons has by law or practice in the Province at the union." The words "or practice" are an addition to, and the only deviation from, the words of the like provision in the B. N. A. Act. under which *Ex p. Renaud*, 1 Pugs. 273, was decided in New Brunswick.

In 1871, after the union, an Act relating to schools was passed by the legislature of Manitoba by which the control of educational matters was vested in a board, consisting of an equal number of Protestants and Roman Catholics. A Protestant and a Roman Catholic superintendent of education were to be appointed and Protestant and Roman Catholic school districts established, the legislative grant for schools to be apportioned to each. This Act was amended from time to time, but the system it established continued until 1890.

By 53 V. c. 38, passed by the legislature in 1890, a system of public schools was established in the Province, the former system was abolished, the control of educational matters was vested in a Department of Education, consisting of a committee of the Executive Council, and all the schools were to be free and no religious exercises to be allowed except as authorized by the advisory boards to be established under the provisions of the Act. The ratepayers of the several municipalities were to be indiscriminately taxed for the support of the public schools.

A Roman Catholic ratepayer of the city of Winnipeg moved to quash by-laws passed to impose a tax for school purposes, and in support of his motion an affidavit of the Archbishop of St. Boniface was read setting forth the position of the Roman Catholic Church with respect to education and the control it always exercised over the same, and showing that prior to the admission of Manitoba into the union Roman Catholics had their own schools partly supported by fees from parents and partly by the funds of the Church.

Held, reversing the judgment of the Court of Queen's Bench, Manitoba, 7 Man. L. R. 273, that this Act, 53 V. c. 38, prejudicially affected the rights and privileges with respect to denominational schools which Roman Catholics had by practice in the Province at the union, and was therefore *ultra vires* of the Provincial legislature.

Ex p. Renaud, 1 Pugs. 273, distinguished.

S. H. Blake, Q.C., and *Ewart*, Q.C., for the appellants.

Martin, A.-G., and *Gormully*, Q.C., for the respondents.

[17TH NOVEMBER, 1891.

In re LISGAR DOMINION ELECTION. COLLINS v. ROSS.

Election petition — Preliminary objections — R. S. C. c. 9, s. 63 — English General Rules — Manitoba—Copy of petition—R. S. C. c. 9, s. 9 (h) — Description and occupation of petitioner.

Held, affirming the judgment of the Court below, 11 Occ. N. 197, that the Judges of the Court in Manitoba not having made Rules for the practice and procedure in controverted elections, the English Rules of Michaelmas Term, 1868, were in force: R. S. C. c. 9, s. 63; and that under Rule 1 of the English Rules, the petitioner, when filing an election petition, is bound to leave a copy with the clerk of the Court to be sent to the returning officer, and that his failure to do so is the subject of a substantive preliminary objection and fatal to the petitioner; STRONG and GWYNNE, JJ., dissenting.

2nd., Reversing the judgment of the Court below, that the omission to set out in the petition the residence, address, and occupation of the petitioner is a mere objection to the form, which can be remedied by amendment, and is therefore not fatal.

Martin, A.-G., for the appellant.

McCarthy, Q.C., for the respondent.

PRINCE EDWARD ISLAND.]

In re QUEEN'S COUNTY DOMINION ELECTION. HENNESSY v. DAVIES.

Election petition — Preliminary objections — Personal service at Ottawa — Security—Receipt—R. S. C. c. 9, ss. 8, 9 (e) and (g), and 10.

In Prince Edward Island two members are returned for the electoral district of Queen's County. With an election petition against the return of the two sitting members, the petitioner deposited the sum of $2,000 with the deputy prothonotary of the Court at Charlottetown, and in his notice of presentation of the

petition and deposit of security he stated that he had given security to the amount of one thousand dollars for each respondent, "in all two thousand dollars duly deposited with the prothonotary as required by statute." The receipt was signed by W. A. Weeks, the deputy prothonotary appointed by the Judges, and acknowledged the receipt of $2,000, without stating that $1,000 was deposited as security for each respondent. The petition was served personally on the respondents at Ottawa.

Held, 1st that personal service of an election petition at Ottawa without an order of the Court is a good service under s. 10 of the Controverted Elections Act; 2nd that there being at the time of the presentation of the petition security to the amount of $1,000 for the costs, etc. for each respondent, the security given was sufficient: R. S. C. c. 9, ss. 8, 9 (e); 3rd that the payment of the money to the deputy prothonotary of the Court at Charlottetown was a valid payment: R. S. C. c. 9, s. 9 (g).

Peters, Q.C., A.-G., for the appellants.

W. A. Morson, for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

CH. D.] [10TH NOVEMBER, 1891.

TOWN OF THOROLD v. NEELON.

Company—Shares—Collateral security—Liability to contribution—Transfer of shares only partly paid up as fully paid up—Directors—Agreement—Absence of corporate act—Ultra vires—Ratification by meeting of creditors.

An agreement was entered into between a company, certain of its shareholders, and the defendant, who was the vice-president of the company, whereby it was agreed that the share-

holders should procure certificates for the amount of certain stock of the company held by them and said to be fully paid up, and should transfer the same to the defendant, in consideration of advances of money to be made by the defendant to the company. One of the aforesaid shareholders having 188 shares of stock with 40 per cent. paid up thereon, and being unable to pay up the remaining 60 per cent., it was suggested at a meeting of the directors that, for the purpose of enabling the agreement to be carried out, the payments upon the 188 shares should be wholly applied to 75 shares, which should then be transferred to the defendant as fully paid up shares. This suggestion was acted upon by an entry being made in the company's books of the transfer to the defendant of the 75 shares as paid up stock, but no resolution authorizing this appropriation was passed, nor was the company's certificate for such stock procured.

Held, in an action by judgment creditors of the company, reversing the judgment of the Chancery Divisional Court, 20 O. R. 86, that the intended appropriation was not made with the authority of the company by any corporate act, and that therefore there remained 60 per cent. still unpaid on the 75 shares for which the defendant was liable.

Held, affirming the judgment of the Court below, that shares only partly paid up, which have been improperly recognized as fully paid up by the directors, whose action in regard to them has been confirmed by a general meeting of the shareholders, must be treated as against creditors of the company as fully paid up shares in the hands of a transferee for value without notice of the actual facts.

Robinson, Q.C., and *H. H. Collier*, for the plaintiffs.

W. Cassels, Q.C., and *R. Gregory Cox*, for the defendant.

FERGUSON, J.]

ATTORNEY GENERAL FOR CANADA v. CITY OF TORONTO.

Municipal corporations—By-law as to payment of water rates—Discount to consumers—Exception as to government institutions—Taxes.

By 35 V. c. 79, as amended by 41 V. c. 40, the corporation of the city of Toronto were empowered in regard to the city

water-works to fix the price, rate, or rent which any owner or occupant of any house, lot, etc., in, through, or past which the water pipes should run, should pay as water rate or rent, whether the owner or occupant should use the water or not, having due regard to the assessment and to any special benefit or advantage derived by such owner or occupant, or conferred upon him or his property by the water works. The corporation were also empowered to fix the rate to be paid for the use of the water by public buildings. Pursuant to these powers a by-law of the corporation was passed providing that the half-yearly rates "paid within the first two months of the half-year for which they are due shall be subject to a reduction of 50 per cent. save and except in the case of Government or other institutions which are exempt from city taxes, in which cases the said provisions as to discount shall not apply."

Held, that "government institutions" in the by-law were "public buildings" within the meaning of the Act.

Held, also, that the price, rate, or rent paid for the water was not a tax, but merely the price paid for the water supplied to the consumer, and that the corporation were not obliged to allow for water supplied to public buildings the discount allowed to tax payers.

Judgment of FERGUSON, J., 20 O. R. 19, affirmed.

James Reeve, Q.C., and *Wickham*, for the appellant.

Biggar, Q.C., for the respondents.

STREET, J.]

In re ONTARIO NATURAL GAS CO. AND TOWNSHIP OF GOSFIELD SOUTH.

Municipal corporations—Mineral gas—R. S. O. c. 184, s. 565.

Natural gas is a "mineral" within the meaning of the Municipal Act, R. S. O. c. 184, s. 565.

Judgment of STREET, J., 19 O. R. 591, affirmed.

Robinson, Q.C., and *H. S. Osler*, for the appellants.

Aylesworth, Q.C., for the respondents.

High Court of Justice.

CHANCERY DIVISION.

[Boyd, C., 3rd December, 1891.

ALDRICH v. ALDRICH.

Husband and wife—Alimony—Condonation of matrimonial offences—Revival of same by husband's subsequent adultery—Effect of husband's adultery —Evidence.

Condonation of matrimonial offences is always on the condition that there shall be no repetition of *any* matrimonial offence in the future; and the effect of a husband's subsequent adultery is to revive previously condoned acts of cruelty.

The evidence of one witness, by confession of loose character, is not sufficient to prove adultery, unless corroborated.

Proof that the wife was much with another man, drove with him in cabs, was seated with him while he held her hand, that he accompanied her when travelling, and corresponded with her clandestinely, does not show such matrimonial offences as will disentitle her to alimony.

A woman, both in law and in morals, is justified in leaving and in refusing to return to her husband who has committed adultery; but his act which breaks up the household does not relieve him from his duty to maintain her, and proof of that offence would be sufficient upon which to award alimony.

T. McVeity, for the plaintiff.

R. G. Code and *J. F. Orde*, for the defendant.

IN CHAMBERS.

[BOYD, C., 30TH DECEMBER, 1891.

In re RENWICK, RENWICK v. CROOKS.

Infants—Past maintenance—Special circumstances.

Where applications for past maintenance of infants are made, and especially where the only fund for payment is the corpus of the estate, the applicant should come on petition before a Judge in Chambers showing and proving the special circumstances relied on to overcome the general rule that arrears of past maintenance are not given, which rule applies whether the claimant is father, mother, or other relative, a step-parent or a stranger.

And where it appeared that a person making a claim for the past maintenance of his infant step-children, against the proceeds of the sale of their father's farm, realized in administration proceedings, had not maintained the infants on the basis of being compensated therefor, but that his claim was an after-thought, a Judge refused to confirm the Master's recommendation of an allowance.

F. Stone, for the plaintiff.

W. H. Blake, for the claimant.

J. Hoskin, Q.C., for the infants.

[FALCONBRIDGE, J., 23RD DECEMBER, 1891.

FERGUSON v. CITY OF TORONTO.

Indemnity—Third party notice—Setting aside—Action for negligence—Insurance policy, construction of—Inconsistency of pleading with claim over for indemnity.

The plaintiff sued for a personal injury, which by his statement of claim he alleged he had received, when acting as conductor of a street railway car operated by the defendants, by reason of the negligence of a servant of the defendants, who was driving a scavenger waggon used by the defendants. The company who had operated the railway before the defendants assumed it, were insured against all sums for which they should become liable

to any employee in their service, while engaged in their work. The insurance policy was assigned to the defendants when they assumed the railway. The defendants served on the insurance company a third party notice claiming indemnity.

Held, that the policy did not cover injuries accruing by reason of negligence of the defendants or their servants in other branches of their service; and that the insurance company should not be kept before the Court on the chance of a different state of facts being developed at the trial from that which the plaintiff alleged.

An order was therefore made in Chambers setting aside the third party notice.

J. F. Smith, Q.C., for the insurance company.

H. M. Mowat, for the defendants.

W. A. Leys, for the plaintiff.

[STREET, J., 23RD DECEMBER, 1891.

LOOMIS v. PEARSALL.

Costs—Taxation — Appeal from local officer — Reference to taxing officer at Toronto—Increasing amount taxed to respondent.

An appeal by the defendant from the taxation by a local officer of the plaintiff's costs of the action having been brought before STREET, J., he directed that one of the taxing officers at Toronto should revise the bill and report to him. The taxing officer reported that the plaintiff should be allowed $4.80 more than had been taxed to him by the local officer.

J. M. Clark, for the plaintiff, asked for an order in accordance with the report.

Widdowson, for the defendant.

STREET, J., held that, as the plaintiff had not appealed against the original taxation, the amount taxed to him could not be increased; and made an order dismissing the defendant's appeal with costs.

[THE MASTER IN CHAMBERS, 11TH DECEMBER, 1891.

BANQUE NATIONALE v. SOUTH AMERICA TRADING CO.

Writ of summons — Defendant without the jurisdiction — Action on foreign judgment—Rules 270, 271.

Motion by the defendants to set aside an order giving leave to the plaintiffs to issue a writ of summons for service upon the defendants without the jurisdiction. The action was brought on a judgment obtained in the Province of Quebec, and was instituted in Ontario for the purpose of realizing the plaintiffs' claim out of assets of the defendants in this province. The plaintiffs had a place of business in Ontario; but the defendants had none.

Held, that failure to pay the amount of the judgment at the plaintiffs' offices in Ontario was not a breach of contract within Ontario within the meaning of Rule 271 (e); and that there is no provision elsewhere in the Rules for the issue of such a writ under the circumstances indicated.

Held, also, that Rule 270 applies only to such actions as are properly brought in Ontario under other Rules; and cannot be relied on to enable a plaintiff to bring an action which otherwise would not lie in this Province.

Order accordingly, setting aside the former order with costs.

Woodworth, for the defendants.

Robert McKay, for the plaintiffs.

[16TH DECEMBER, 1891.

MOLSONS BANK v. NEWTON.

Particulars—Action to set aside transfer of property—Particulars of account since judgment obtained by plaintiffs.

Action by judgment creditors of the defendant William Jackson to set aside as fraudulent the assignment by that defendant to the other defendants of three several mortgages.

Motion by the defendant Ellison for particulars of the indebtedness of the defendant Jackson to the plaintiffs, by reason of which the latter claimed to be entitled to sue as judgment creditors, it being alleged by the defendant Ellison that the judgment obtained

against Jackson, which was signed on default, was for an amount greatly in excess of the latter's actual indebtedness, and that by subsequent payments the whole of the plaintiffs' claim had been satisfied.

Held, that the defendant Ellison was entitled to particulars of the account of the defendant Jackson with the plaintiffs since the judgment, but not to particulars of the judgment itself showing how the amount therein adjudged to the plaintiffs was made up.

W. M. Douglas, for the defendant Ellison.

Rowell, for the plaintiffs.

NOVA SCOTIA.

In the Supreme Court.

WALLACE v. STEWART.

Constable— Action against, for illegal seizure and sale—Plea of want of notice and justification under warrant—Appointment of constable by municipal council—Bona fide and reasonable belief—R. S. c. 56, s. 91.

The defendant, in execution of a warrant placed in his hands as a county constable, for the county rates due and unpaid by Thomas A. Wallace, seized and sold the goods of the plaintiff, Thomas J. Wallace. The warrant was issued by a justice of the peace under the R. S. c. 58. In an action brought by the plaintiff for the taking and conversion of his goods the defendant relied for his justification on two points:—

1. That no notice of action was given under the R. S. c. 56, s. 91; and

2. That the defendant believed he was acting in pursuance of the warrant, and had reasonable grounds for so believing.

Held, (1) that the notice required by R. S. c. 56, s. 91, applies only to any office held under the provisions of the chapter, and that, in the absence of a provision enabling the municipal councils to appoint county or township constables, the defendant was not entitled to the protection of the notice pleaded.

(2) That the defendant had failed to establish any reasonable ground for supposing that the thing done by him was done in execution or under the authority of the Act, (*a*) because the plaintiff's name was not in the warrant, and it was no excuse that the defendant supposed him to be the man; (*b*) because there was evidence that, after the seizure and before the sale, the defendant was notified that the plaintiff was not the person liable for the rates for which his goods were seized.

The defendant's appeal was dismissed with costs.

McKAY v. O'NEIL.

Action on promissory notes—Defence of agreement to insure and loss operating as discharge of makers—Counter-claim not necessary—Verbal agreement to insure valid, in absence of statute — Pleading — Evidence — Costs— R. S. c. 104, ss. 2, 4, 5, 7, 12.

The plaintiff agreed to advance the defendants a sum of money to pay for fitting out their vessel, the "May Bent," on the defendants giving four promissory notes for the amount with interest at seven per cent., payable in three, six, nine, and twelve months, notes to be secured by a mortgage of the interest of one of the defendants in the vessel, and an insurance policy on the vessel for the amount advanced. At or about the time the mortgage was given, the plaintiff made a verbal proposal to become his own insurer on being paid the same premium as would be paid an insurance company. This was assented to and the plaintiff was paid the premium he required. The vessel was lost at sea shortly after the first note was paid, and the plaintiff having sued on the remaining notes:—

Held, reversing the decision of the trial Judge with costs, that the defendants were not liable, the agreement to insure having operated as payment.

That, in the absence of statutory enactment, neither a contract of insurance nor a contract for insurance need be in writing.

That the subject matter of insurance being defined, the amount of indemnity and duration of the risk definitely fixed, and the

premium or consideration determined, the terms of the agreement were sufficiently explicit.

That it was not necessary for the defendants to counter-claim to avail themselves of the agreement to insure as a defence to the action, the matters alleged constituting an equitable right which a Court of equity would have the right to enforce, and to which the Court must give effect under the provisions of the Judicature Act, R. S. c. 104, ss. 2, 4, 5, 7, and 12.

That parol evidence was admissible notwithstanding part of the contract was in writing.

HIRTLE v. KAULBACH.

Misrepresentations—Sale of land by administrator set aside—Costs.

The defendant K., having a claim against J. H., and learning that he had made a deed of half of a lot of land to his son, J. H., obtained a judgment by confession against both father and son. On the father's death he applied for and obtained letters of administration as a creditor. Subsequently he obtained a license to sell the land to pay the judgment and another claim. At the sale he represented that the whole property was to be sold, subject only to a claim for dower. The property was knocked down to the plaintiff for $850. The son, J. H., having placed his deed on record after the sale, prior to the recording of the plaintiff's deed from the administrator, the plaintiff brought an action to set aside the sale, joining both J. H. and the administrator as defendants. J. H. was the only defendant who appeared and pleaded.

Held, that the plaintiff ought to be discharged from the purchase made under such circumstances.

2. That J. H., being an heir and having an interest as such in the land, was properly made a defendant.

Per RITCHIE, J.—That the defendant J. H., having opposed the appeal, should pay costs.

That the plaintiff, having raised and gone to trial on immaterial issues, should pay the costs of those issues and of the trial.

HALIFAX BANKING CO. v. CREIGHTON.

Jury—Finding of "don't know" in answer to question—New trial—Fraud on co-partner.

A. and B. were doing business at Halifax, and A., B., and C. were doing business at Liscomb. B., a member of both firms, made a promissory note in the firm name of A., B., & C. in favour of the firm of A. & B. and indorsed it to the Halifax Banking Company in part payment of an over-draft, in fraud of his co-partner C. The jury, in answer to the question "did plaintiff bank in discounting said note know that Esson made the same in fraud of his co-partner," said "don't know."

Held, that there must be a new trial; TOWNSHEND, J., dissenting.

Per GRAHAM, E.J., and RITCHIE, J., that the Court ought not to give judgment irrespective of the findings upon an inference which was open to debate, unless satisfied that it had all the facts before it.

Per MCDONALD, J., that the answer "don't know" was no finding, and it was only upon the findings that a legal verdict could be entered.

HART v. CONDON.

Account stated—Compound interest—Agreement.

Judgment was given in favour of the plaintiffs in an action on an account stated. On appeal it was shown that one of the items making up the account stated was for compound interest, and that, deducting this item, the amount due the plaintiffs was below the jurisdiction of the Court. No agreement to pay compound interest was proved, nor could such an agreement be inferred from the previous course of dealings.

The appeal was allowed with costs.

MANITOBA.

In the Queen's Bench.

[THE FULL COURT, 21ST DECEMBER, 1891.

REGINA v. CHISHOLM.

JACOBS' CASE.

Criminal law—Crown case reserved—Indictment for assault and carnally knowing—General verdict of guilty.

Crown case reserved. The prisoner was tried upon an indictment charging that he "on 29th September, 1891, in and upon one Maggie Jacobs, a girl under the age of fourteen years, to wit of the age of thirteen years and six months, feloniously did make an assault, and her, the said Maggie Jacobs, then and there feloniously did unlawfully and carnally know and abuse, against the form," etc. The jury returned a verdict of guilty.

The evidence shewed that the girl was thirteen years of age in the month of April, 1891, and that there was on her part consent to anything done to her.

At the close of the trial the following question was reserved for the opinion of the Court of Queen's Bench:—

Was it open for the jury to convict the prisoner by a general verdict of "guilty" upon an indictment framed as the indictment was in this case, when there was consent upon the part of the girl?

Sentence was passed, but the execution of the same was respited until the question should be decided by the Court.

On behalf of the prisoner it was contended that the indictment contained two charges, one for assault and one for carnally knowing, and that the general verdict of guilty could not stand, because it did not appear to which of the offences it

applied; if it applied to the assault the consent of the girl was a defence, or a bar to the charge.

Held, that the question must be answered in the affirmative, and the conviction affirmed.

The words "feloniously did make an assault" in the indictment appeared to be simply prefatory or descriptive of the offence, and unnecessary.

Howell, Q.C., for the Crown.

Hagel, Q.C., and *Cassidy*, for the prisoner.

REGINA v. CHISHOLM.

HAMMOND'S CASE.

Criminal law—Crown case reserved—Offences against females—Age—Consent—Indictment for assault and carnal knowledge of girl under fourteen—Verdict of guilty of indecent assault—Criminal Procedure Act, R. S. C. c. 174, s. 140.

Crown case reserved. The prisoner was tried upon an indictment charging that he "between the 1st day of March and the 1st day of August, 1891, in and upon one Elizabeth Hammond, a girl under the age of fourteen years, feloniously did make an assault, and her, the said Elizabeth Hammond, then and there, feloniously did unlawfully and carnally know and abuse, against the form," etc.

Section 140 of the Criminial Procedure Act, R. S. C. c. 174, provides that no bill of indictment for an indecent assault shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer an indictment to be preferred against him for such offence, or unless the indictment for such offence is preferred by the direction of the Attorney-General for the Province, or by the direction or with the consent of a Court or Judge having jurisdiction to give such direction or try such offence.

The prisoner had not been committed to or detained in custody, nor had he been bound by recognizance to appear to answer to an indictment to be preferred against him for the offence set out in the indictment, and the indictment upon which he was brought up for trial was not one preferred against him before the grand jury, by direction of the Attorney-General for the Province, or by direction or with the consent of a Court or Judge having jurisdiction to give such direction or to try the offence.

The evidence given at the trial proved that the girl Hammond was fourteen years of age on the 25th August, 1891, and that the offence took place after 1st September, 1891; it also showed that there was, on her part, consent to anything which was done to her by the prisoner.

At the trial the jury found the prisoner guilty of an indecent assault.

The Judge passed sentence, but respited the execution thereof and reserved the following questions for the opinion of the Court of Queen's Bench.

1. Can the prisoner be convicted of an indecent assault upon the indictment above set out and laid before the grand jury, without direction of the Attorney-General, and without direction or consent of a Court or Judge having jurisdiction to give such direction as to try the offence, having regard to the provisions of the Criminial Procedure Act, R. S. C. c. 174, s. 140?

2. Was it open to the jury to find the prisoner guilty of an indecent assault upon an indictment framed as is the indictment above set out?

3. Was the consent of the girl Hammond a defence or a bar to a verdict upon the indictment above set out, finding the prisoner guilty of committing an indecent assault upon her?

4. Was the evidence given on the part of the Crown to prove that the offence was committed between the first day of March and the first day of August, 1891, such as should have been left to the jury, or should the case have been withdrawn from the jury at the close of the case for the Crown?

Held, that, as the girl was shown to have been over fourteen years of age when the act complained of was committed upon her, and she consented, it must be held the act was not an offence under the statute, and the conviction must be quashed.

Per DUBUC, J.—There is some doubt whether the first question should be answered affirmatively or negatively. The second question should be answered in the negative.

As to the fourth question, the case should have been withdrawn from the jury.

Per KILLAM, J.—It is unnecessary in this case to answer any question but the fourth, and that should be answered in the negative. The evidence appears to have left it in doubt whether the act charged was committed before or after the girl attained the age of fourteen years.

Conviction quashed.

Howell, Q.C., for the Crown.

Hagel, Q.C., and *Cassidy*, for the prisoner.

REGINA v. BRICE.

Criminal law — Crown case reserved — Indictment for assault and carnal knowledge—Verdict of guilty of indecent assault—Age—Consent.

Crown case reserved. The prisoner was arraigned upon an indictment charging that he "in and upon one A. R., a girl under the age of 14 years, feloniously did make an assault and her the said A. R. then and there feloniously did unlawfully and carnally know and abuse, against the form," etc.

It was proved that the girl was between eight and nine years old, and the acts complained of were committed with her tacit consent.

The jury found the prisoner guilty of committing an indecent assault upon the girl.

Counsel for the prisoner objected that the indictment charged an assault in addition to carnal knowledge, and not the statutory offence specified in the section substituted for the 39th section of c. 162, R. S. C., by 53 V. c. 37, s. 12, and would not support any verdict against the prisoner; also that under such an indictment the prisoner could not be convicted, if the act was done with the consent of the female; also that the indictment not charging, as was claimed, an offence within the section substituted for s. 39, the prisoner could not under it be convicted of an indecent assault; and also that the prisoner was not charged

with or tried under an indictment for an indecent assault within the meaning of s. 7 of 53 V. c. 37, and that therefore her consent was an absolute bar to a conviction of the offence of committing an indecent assault.

The following questions were submitted for the opinion of the Court:

1. Was it open to the jury upon the indictment above set forth to find the prisoner guilty of the offence of committing an indecent assault upon the female therein named?

2. Was the consent of the girl a defence or bar to a verdict, upon the said indictment, finding the prisoner guilty of committing an indecent assault upon her?

Held, that the first question should be answered in the affirmative, and the second question in the negative; and the conviction should be affirmed.

Howell, Q.C., for the Crown.

Hagel, Q.C., for the prisoner.

[KILLAM, J., 14TH DECEMBER, 1891.

In re MANITOBA MILLING Co.

Costs—Company—Winding-up—Two petitions presented by creditors—Costs of second petitioner.

Two creditors, Blake and Henderson, filed petitions for winding up the company. Blake's was filed and served before Henderson's was filed. Both petitions were presented to the Court and came on for hearing together on 19th October, 1891.

An order was subsequently made for winding up the company.

A question arose as to the costs of the petition filed by Henderson.

Held, that the second petitioner, Henderson, should have his share of costs of creditors supporting a winding-up order, and the costs of his own petition up to and including presentation, when he first had notice of the former one.

In re Building Societies' Trust, 44 Ch. D. 144, followed.

Hough, for Blake.

Darley, for Henderson.

IN CHAMBERS.

[TAYLOR, C. J., 16TH DECEMBER, 1891.

LIVINGSTONE v. ROWAND.

Pleading—Demurrer to defendant's pleas allowed — Subsequent application to strike out count in declaration.

The plaintiff, a tenant, sued the defendant, his landlord, for damages caused to pictures and other articles, by steam pipes freezing and bursting. The defendant pleaded that as soon as he became aware of the damage done and that the radiators had burst he set to work and repaired the same. The plaintiff demurred to several of the pleas on the ground that the same were no answer to the declaration.

Judgment was given for the plaintiff. It was held that the count of the declaration seemed to be double, setting out two separate claims, and that this was a defect that could be taken advantage of only by moving to strike out the count as embarrassing. The defendant had passed the fault over and having pleaded was bound to answer both claims in the count. One of the pleas was bad because it only answered part of the declaration and others were, because they did not answer the declaration at all.

The defendant then moved to strike out the count as embarrassing, and the referee made the summons absolute.

The plaintiff appealed to a Judge in Chambers.

Held, that it was too late for the defendant to move. The appeal should be allowed with costs, and the summons in Chambers to strike out the count dismissed with costs.

Hagel, Q.C., and *Darley*, for the plaintiff.

Kennedy, Q.C., for the defendant.

Supreme Court of Canada.

IN CHAMBERS.

ONTARIO.] [PATTERSON, J.A., 3RD DECEMBER, 1891.

In re HALTON DOMINION ELECTION.

LUSH v. WALDIE.

Controverted election petition—Appeal—Dissolution of Parliament—Return of deposit—Costs.

In the interval between the taking of an appeal from a decision delivered on the 8th November, 1890, in a controverted election petition, and the February sittings, 1891, of the Supreme Court of Canada, Parliament was dissolved, and as the effect of the dissolution the petition dropped. The respondent subsequently, in order to have the costs that were awarded to him at the trial taxed and paid out of the money deposited in the Court below by the petitioner as security for costs, moved before PATTERSON, J.A., in Chambers, to have the appeal dismissed for want of prosecution, or to have the record remitted to the Court below. The petitioner asserted his right to have his deposit returned to him.

Held, that the final determination of the right to costs being kept in suspense by the appeal, the motion should be refused.

2nd. That, inasmuch as the money deposited in the Court below ought to be disposed of by an order of that Court, the Registrar of this Court should certify to that Court that the appeal was not heard, and that the petition was dropped by reason of the dissolution of Parliament on the 2nd February, 1891.

J. K. Kerr, Q.C., for the respondent.

Aylesworth, Q.C., for the petitioner.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [14TH JANUARY, 1892.

KNOWLTON v. FAUQUIER.

Solicitor and client—Judgment recovered by solicitor for client—Right of solicitor to insist upon payment to himself—Right to issue execution where cheque made payable to client.

In this case, reported 11 Occ. N. 327, an application for leave to appeal was made by the defendant, and was dismissed with costs.

Aylesworth, Q.C., for the defendant.

E. Taylour English, for the plaintiff.

C. P. D.] [10TH NOVEMBER, 1891.

HICKERSON v. PARRINGTON.

Fraudulent preference—Action to set aside deed—Knowledge by grantee of insolvency.

The fact that the grantors in a deed were, to the knowledge of the grantee, insolvent at the time of making the deed, is in itself insufficient to cause the deed to be set aside as a fraudulent preference under R. S. O. c. 124.

Molsons Bank v. *Halter*, 18 S. C. R. 88, followed.

Where valuable consideration has been given, clear evidence of actual intent to defraud the creditors of the grantor is necessary to have the deed declared void under the Statute of Elizabeth.

Judgment of the Common Pleas Divisional Court, affirming the judgment of ARMOUR, C.J., reversed.

MacGregor and *W. Nesbitt*, for the appellants,

W. D. McPherson and *J. M. Clark*, for the respondents.

BOYD, C.]

CAMPBELL v. ROCHE.

McKINNON v. ROCHE.

Assignments and preferences—Preferring creditors—Money advanced to insolvent to pay creditors—Action to set aside security—Consideration bad in part.

These were two actions brought to set aside two chattel mortgages as void under R. S. O. c. 124. The cases were tried together. In the first case the mortgagee raised money and advanced it to the mortgagor, who was then in insolvent circumstances, receiving therefor the mortgage in question. The insolvent thereupon paid off certain of his creditors with the money thus raised.

Held, that the mortgage was valid.

Semble, that it would be so whether the mortgagee knew of the insolvent's intention to apply the moneys to pay off certain creditors in preference to others, or not.

In the second case, it was shown that the mortgage was unreal as to $500, part of the alleged consideration of $4,000.

Held, that it was therefore void as to the whole; following *Commercial Bank* v. *Wilson and Douglas*, 8 E. & A. 257.

Judgment of BOYD, C., in the first case reversed and in the second case affirmed.

Moss, Q.C., and *D. E. Thomson*, Q.C., for the appellants.

McCarthy, Q.C., and *Laidlaw*, Q.C., for the respondents.

IN CHAMBERS.

[OSLER, J.A., 2ND DECEMBER, 1891.

In re HALTON DOMINION ELECTION.

EVANS v. HENDERSON.

Controverted election petition—Deposit of money in Court as security for costs—Payment to persons who furnished it—Opposition by creditor of petitioner—Champerty and maintenance.

This petition having been tried and the respondent unseated, a motion was made before OSLER, J.A., in Chambers for payment out of Court of the deposit. The applicants were three

persons by whom the amount of such deposit was furnished, and who showed by the production of a written agreement and a satisfactory affidavit that the money was theirs, and that no part of it was furnished by or belonged to the petitioner.

The motion was opposed on behalf of one James Cleane, a Division Court execution creditor of the petitioner, who had obtained a stop order under Rule 192 directing that such moneys should not be paid out of Court without notice to him.

J. A. Paterson, for the applicants.

J. A. Macdonald, for Cleane, contended that the moneys belonged to the petitioner, or that the applicants were estopped from alleging the contrary, on the ground that the agreement in pursuance of which they were furnished and paid in on the petitioner's behalf was illegal, as savouring of champerty and maintenance.

OSLER, J.A.—There is nothing in the objection. Before the law was changed so as to require the security to be by a cash deposit, it was given by means of the bond or recognizance of two sufficient sureties. If that was not maintenance, neither can the present mode of giving security be such, at all events where, as in this case, it appears that the petitioner and the persons furnishing the money had a common interest in the election. The statute does not require that the petitioner shall personally furnish the security, or that the money paid in shall be his money. All that is necessary is that at the time of the presentation of the petition, "security . . shall be given on behalf of the petitioner:" [R. S. C. c. 9, s. 9 (*d*)]; for the prescribed purposes.

Bradlaugh v. *Newdegate*, 11 Q. B. D. 1, is quite distinguishable. There it appeared that the defendant had procured one Clarke to sue the plaintiff for the penalty imposed by Act of Parliament for sitting and voting as a member of Parliament in contravention of the Act, and had given Clarke a bond of indemnity against all costs and expenses he might incur in consequence of the action. Bradlaugh thereupon brought an action for maintenance against him. It was held that the defendant and Clarke had no common interest in the result of the action for the penalty; that the defendant's conduct amounted to maintenance; and that the action for maintenance lay.

Carr v. *Tannahill*, 30 U. C. R. 217; 31 U. C. R. 201, was also relied on, but it does not assist the opposant. That was an

action upon an agreement between the plaintiffs and one of the defendants, made pending a suit for specific performance of a contract by one R. to sell the plaintiffs a mine, that certain persons should purchase the mine from the plaintiffs, that they should deposit the money required for security for costs, which the plaintiffs had been ordered to give in the specific performance suit, and pay all costs which the plaintiffs might incur therein, etc. It was held that the agreement was void for champerty and maintenance, and that the plaintiffs could not recover thereon. Wilson, J., in giving judgment (31 U. C. R. at p. 210) says: "If the defendants had an interest in the property at the time of their purchase from the plaintiffs, the purchase or prosecution of the suit would not, I think, have been illegal: *Hunter* v. *Daniel*, 4 Hare 420, 430. Or if they then had a claim which they believed gave them an interest in the property: *Findon* v. *Parker*, 11 M. & W. 675. Here there is no reason for presuming there was anything of the kind. The defendants appear to have been strangers to the title and the property at the time of their purchase." This case does not decide that the giving of security for costs alone would have been illegal.

In the *North Simcoe Election Petition*, 10 U. C. L. J. N. S. 232, there was a preliminary objection to the petition that an association of persons had agreed to pay the costs of the petition, and that the name of the petitioner should be used. Richards, C.J., overruled the objection. He said: "As to the alleged champerty, if the petitioner could not enforce the alleged bargain, that the persons known as the L. C. Association made with him, as to paying costs, that does not establish the fact that the petitioner has not a right to present a petition. His right arises from his being an elector duly qualified to vote, not from any interest acquired by virtue of a champertous bargain. It may be doubted whether a proceeding of this kind is one to which the ordinary rules relating to champerty can apply." . . .

But whether the agreement to give and giving the money in question was or was not maintenance and an illegal agreement, which I do not believe, since that cannot be illegal which the law requires to be done, whether it be giving a bond for security for costs or depositing money for the same purpose, the most obvious answer to the objections now made by the petitioning creditor is that the money has not become the money of the petitioner. It has served the purpose for which it was deposited,

and no one has any longer any claim in respect of it, but the persons to whom it belongs. Whether the petitioner could make any effectual opposition to its payment to them, I neither suggest nor consider. It is enough to say that he does not do so, and that if he did, one of the most improbable things that could happen would be that any Judge would hold as a consequence that it should be paid out to him or to his creditors.

I therefore make the order as asked.

High Court of Justice.

CHANCERY DIVISION.

[The Divisional Court, 23rd December, 1891.

HUMPHREY v. ARCHIBALD.

Evidence — Malicious prosecution—Police officers' privilege — Disclosure of information—Discretion of Judge.

In an action for malicious prosecution against two police officers, the defendants declined on examination before the trial to give the name of the person from whom the information was received on which the plaintiff was arrested and prosecuted, on the ground that it was contrary to public policy and would obstruct the detection of crime if the name of the informer was given.

Held, reversing the decision of Ferguson, J., and the Master in Chambers, that, as the information sought was material to the fair trial of the issue, the defendants must give the name; and they were ordered to appear at their own expense for further examination.

Per Boyd, C.—It is for the Judge to decide whether the answering of any such question would or would not in such case be injurious to the administration of justice.

The most efficient protection for the detective is not to isolate him by some circle of privilege, but to hold him harmless when he acts without malice and upon reasonable grounds of suspicion; but the same facility of redress should be given against him if he abuses his position as against the ordinary unofficial

member of the community who engages in unscrupulous and unjustifiable prosecutions under the criminal law.

Per MEREDITH, J.—The matter does not rest in the mere discretion of the magistrate, Judge, or Court. The disclosure should not be compelled without the consent of the informer except when material to the issue, when higher public interest requires it; and it then should be enforced.

Semble, per MEREDITH, J.—There is nothing to show that it was any part of the duty of the defendants *to lay any information*, so that it may be that in so doing they stand on no more privileged ground than a private prosecutor.

J. G. Holmes, for the plaintiff.

H. M. Mowat, for the defendants.

[BOYD, C., 23RD DECEMBER, 1891.

In re BOOTH AND McLEAN.

Vendor and purchaser—Contract of exchange of lands—Representation as to incumbrances—Mortgage for certain amount at a certain rate—Included in larger mortgage with release clause—Rate of interest to be reduced on punctual payment.

In an agreement for the exchange of lands it was stipulated that one of the properties was "subject to a mortgage incumbrance for $750 bearing interest at seven per cent. per annum." It was ascertained that the property was one of four houses and lots mortgaged for $3,000, with an agreement to release each on payment of $750, and that the rate of interest was ten per cent., payable half yearly at seven per cent. if paid punctually.

Upon an application under the Vendor and Purchaser Act:—

Held, that it could not be said that the land was charged merely with a mortgage of $750 at seven per cent. interest; and the representation made did not convey an accurate statement of the real facts.

B. N. Davis, for the vendor.

J. A. Ferguson, for the purchaser.

[26TH DECEMBER, 1891.

In re FRASER AND BELL.

Will—Devise—Estate tail—Remainder expectant thereon—Barring of estate tail—R. S. O. c. 103, s. 3.

In an application under the Vendor and Purchaser Act, in which a title was traced through a will in these words:—"I will and bequeath to my son J. W. and to the heirs of his body, also I will and bequeath to my daughter W. W. and to the heirs of her body, and if either * * should die without leaving heirs of their body (to the survivor) and to the heirs of their body * * and should both die without leaving living issue then I will and bequeath to * * D. R. W. * * * and to F. W., etc.:"—

Held, that there was an estate tail vested in J. W. and that there was nothing in the will to limit or conflict with the estate tail and that there was an ultimate remainder expectant on the estate tail in D. R. W. and F. W. which might be barred under R. S. O. c. 103, s. 3.

Huson Murray, for the vendor.

Hoyles, Q.C., for the purchaser.

[MEREDITH, J., 1ST DECEMBER, 1891.

In re CENTRAL BANK.

CANADA SHIPPING COMPANY'S CLAIM.

Banks and banking—Bill of lading—Promise to transfer—Acquisition of goods attached by process in foreign country before bill of lading delivered—Conflict of law—Proof of foreign law.

A customer of a bank in Ontario arranged with the bank to make advances to him with which to purchase cattle for exportation and sale in England, and undertook to forward the cattle to Montreal and place them in the hands of the shippers for England, who were to make out the bills of lading in favour of and forward them to the bank.

After the cattle were in the hands of the shippers (the company) but before the bills of lading were made out, a judgment

creditor of the customer in the Province of Quebec caused a writ of *saisie-arret* to be served on the company, the effect of which, by Quebec law, is to order the party served to hold the property for the benefit of the judgment creditor.

The company, however, made out the bills of lading to the bank and forwarded the cattle, and at the trial of the action the Quebec Court held that the writ attached on the cattle before the bill of lading was made out, and judgment was given against the company for the value of the cattle, which the company were obliged to pay.

In the winding-up proceedings of the bank in Ontario, the company sought to prove a claim for the amount of the judgment.

Held, affirming the decision of the Master in Ordinary, that the bank acquired some interest in the cattle when placed on board the steamship, good against the customer and the company, and that under the agreement the possession and a special property passed to it; and the company so receiving the cattle held them for the bank.

It was contended that the law of Quebec by which a vendee of goods without actual delivery only acquired the *jus ad rem* and not the *jus in re* should prevail:—

Held, that if there was any difference between the law of Quebec and of Ontario, it should be proved like any other fact, which was not done here; and that under the circumstances in this case, it must be found as a fact that it was the intention of the bank and their customer that their agreement should be governed by the law of Ontario; and as the bank had not only a right to, but a property in, and the possession of, the cattle, the writ of *saisie-arret* was not effectual.

Held, also, following *Suter* v. *Merchants' Bank*, 24 Gr. at p. 374, that to acquire by anticipation a property in a non-existing bill of lading is to acquire by anticipation some right or title of the previous owner of the goods, of which it is but the symbol, before the date of the acquisition of the symbol.

Held, also, that the bank became entitled to the bill of lading as soon as the cattle were received by the company, and could not be prejudiced by delay in the manual operation of filling up and signing the form and delivering it, and so had "acquired" it before they actually "held" it.

Moss, Q.C., for the company.

W. R. Meredith, Q.C., for the liquidators of the bank.

COMMON PLEAS DIVISION.

[THE JUSTICES IN BANC, 4TH JANUARY, 1892.

REGINA v. GURR.

Municipal corporations—By-law—Livery stables and cabs—License.

Held, that, under the by-law of the city of Toronto relating to livery stables and cabs, a person licensed as a livery stable keeper, but not having a cab license, cannot for the purpose of soliciting passengers, stand with his cab at places, though owned by him, other than that mentioned in his license.

Bigelow, Q.C., for the defendant.

H. M. Mowat, for the prosecutors.

REGINA v. ELBORNE.

Liquor License Act—Sale by druggist—Omission to enter in book, effect of—Summary conviction.

It is provided by s. 52 of the Liquor License Act, R. S. O. c. 194, that the prohibitory sections of the Act are not to prevent the sale of liquors by a druggist for strictly medicinal purposes, in packages of not more than six ounces, except under a medical certificate; but that it shall be the duty of such druggist to record in a book every sale, etc.; and in default thereof every such sale, etc., shall, *prima facie*, be held to be a contravention of the Act.

Where therefore a druggist made a sale of liquor, not exceeding six ounces, for strictly medicinal purposes, but made no entry thereof in a book, merely, as was his custom, recording such sale on a slip of paper:—

Held, that this non-entry did not constitute an absolute contravention of the Act, but merely threw on the defendant the onus of rebutting the *prima facie* presumption of such contravention; and the defendant having done so, a summary conviction only on the ground of the omission to record such sale in a book was quashed, but under the circumstances without costs.

G. W. Meyer, for the defendant.

Langton, Q.C., for the prosecutors.

[THE DIVISIONAL COURT, 5TH DECEMBER, 1891.

In re TOWNSHIP OF ANDERDON AND TOWNSHIP OF COLCHESTER NORTH.

Drainage—Necessity for petition—Whether new work—R. S. O. c. 184, ss. 569, 585, 598.

On a petition therefor, a by-law was passed and the usual proceedings taken for the construction of a drain from a point in the township of C. to the town line between the townships of A. and C., where it connected with an existing drain, whereupon certain land-owners on the said town line petitioned the council of C. threatening that if their lands were damaged by the said drain they would hold the township of C. liable therefor, and prayed that they would order the surveyor to continue the drain to a sufficient outlet. Instructions were given to the surveyor, who made the necessary examination and reported in favour of a drain along the town line, and a by-law was introduced for the construction thereof, reciting that a majority of the land-owners benefited had petitioned (referring to the petition last mentioned) and assessing the cost on the lands benefited, etc., and naming the proportion thereof to be borne by the lands in A. On receiving notice of the proposed by-law the township of A. gave notice of appeal, and arbitrators were appointed. Subsequently the township of A. moved for a prohibition against the arbitrators further proceeding in the matter, on the ground of the absence of a proper petition for such drain.

Held, per STREET, J., that the drain in question came within either s. 569 or s. 598 of the Municipal Act, R. S. O. c. 184, and not within s. 585, so that a petition was an indispensable preliminary to the passing of the by-law, whereas the alleged petition was clearly insufficient; that the mere fact of its not being quashed within the period limited by s. 572 would not prevent its being treated as invalid in other proceedings, as here; and that prohibition would be granted, notwithstanding the by-law was good on its face, especially as there had been no laches.

On appeal, the Divisional Court was equally divided, and the appeal failed.

Langton, Q.C., for the township of Colchester North.

Aylesworth, Q.C., for the township of Anderdon.

IN CHAMBERS.

[BOYD, C., 7TH JANUARY, 1892.

KIDD v. PERRY.

Evidence—Foreign commission—Examination of defendant—Discretion.

An application for a commission to examine witnesses out of the jurisdiction is one going to the discretion of the Court, and this discretion will be more strictly exercised where the proposal is to examine an absent party on his own behalf.

In the case of a defendant proposing to have his own examination taken on commission, his personal affidavit may not be essential, but very cogent reasons should be given by some one who can speak with knowledge.

And where the affidavit in support of an application to have the defendant and his mother, by whom the negotiation was conducted with the plaintiff out of which the cause of action arose, examined abroad, was made by the defendant's solicitor, who swore that he believed it was necessary to have their evidence; that it would save expense if it were taken on commission; and that it would be very inconvenient for the defendant to be long away from his place of abode abroad:—

Held, that no case was made for the examination of the defendant abroad; and as to his mother, that the absence of the usual affidavit as to her being a necessary and material witness, and the omission to state any reason why she could not appear at the trial, should prevail to the upholding of the discretion exercised by a Master in refusing to order a commission.

G. G. Mills, for the plaintiff.

J. A. Macdonald, for the defendant.

[ROSE, J., 23RD JANUARY, 1892.

THOMAS v. GRAND TRUNK R. W. CO.

Discovery—Examination of officer of railway company—Bridge foreman.

Motion by the defendants to set aside an appointment for the examination by the plaintiff of one William Crawford, as an officer of the defendant company, for discovery before the trial.

The action was brought by a servant of the defendants for damages for injuries received by the plaintiff by an accident while at work upon a bridge of the defendants, owing to their alleged negligence.

William Crawford was employed by the company as a bridge foreman or inspector, and was the foreman of the gang of men at work upon the bridge, of whom the plaintiff was one, at the time the accident occurred, and saw the accident.

An affidavit of Mr. Hobson, engineer of the southern division of the Grand Trunk Railway was filed, showing that he had sole charge and superintendence of all the bridge work in his division, and of this particular work, but that he was not present at the time of the accident.

Aylesworth, Q.C., for the defendants, contended that Crawford was not an officer, but merely a servant of the company, without any authority, power, or discretion; that Hobson was the proper officer to examine; and that the mere fact that Hobson was not an eye-witness of the accident, while Crawford was, could make no difference.

Marsh, Q.C., for the plaintiff, contended that Crawford was in the position of a sub-head of a department in the railway, in control of the operations of the company at the time the accident happened, and was, therefore, an officer of the company examinable for discovery.

ROSE, J., held that Crawford was not an officer examinable under Rule 487; that the fact of the absence, at the time of the accident, of Mr. Hobson, who was in supreme control of the work, did not make the person in temporary charge examinable.

Order made setting aside the appointment, with costs to the defendants in any event.

[MACMAHON, J., 7TH JANUARY, 1892.

NESBITT v. ARMSTRONG.

Married woman—Summary judgment—Separate estate—Amendment—Writ of summons—Special indorsement.

In an action upon a covenant in an agreement, whereby the defendants covenanted to pay the plaintiff the moneys then owing to him and other moneys thereafter to be advanced,

the writ of summons was specially indorsed with particulars showing the amounts and dates of the various advances :—

Held, a sufficient special indorsement.

Where it is shewn that a married woman defendant has separate estate, judgment may be entered against her as to such separate estate, upon default or by order under Rule 739.

And where the writ of summons did not show that one of the defendants was a married woman having separate estate, but the plaintiff's affidavit filed on a motion for a summary judgment under Rule 739 did show it, the plaintiff was allowed to amend his writ and to enter a proprietary judgment against her.

Masten, for the plaintiff.

Dewart, for the defendant E. G. Armstrong.

MASTER'S OFFICE.

[THE MASTER-IN-ORDINARY, 14TH JANUARY, 1892.

WEST v. SINCLAIR.

Mechanic's lien—53 V. c. 37—Jurisdiction of Master to determine validity of conveyance—Priorities between mortgagee and lien-holder—Notice.

In a proceeding to enforce a mechanic's lien, begun in the Master's office under the Summary Procedure Act, 53 V. c. 37, the priority of a certain mortgage to the defendant McCausland and the validity of a conveyance by the defendant Sinclair to his wife were attacked by the plaintiff.

D. Macdonald, for the plaintiff.

Haverson, for the defendant McCausland.

Abbott, for the Sinclairs.

MR. HODGINS, Q.C., MASTER-IN-ORDINARY.—The question of the right of a Master or Referee, acting under the statutory jurisdiction in respect of mechanics' liens conferred by 53 V. c. 37, to try cases involving the validity or invalidity of conveyances and mortgages of land alleged to be fraudulent and void against creditors and lien-holders under the statutes of Elizabeth and chapters 96 and 124 of the R. S. O., though incidentally referred to in this case, has not been argued. The statute is silent as to

this power. The Act of 1890 gives an original and special jurisdiction to certain judicial officers, and therefore comes within the rules governing statutory powers conferred upon a Judge or officer as *persona designata*. It has been held that no jurisdiction other than that given by the Act, or necessarily incident to it, can be exercised; and that statutes creating special jurisdictions are not to be extended beyond the fair import of the statutory grant, and that presumptions which are incident to the ordinary tribunals are not allowable in importing powers in the jurisdiction other than those specially given by the legislature. But although Courts have intimated that where doubts exist as to the jurisdiction of statutory officers it is inadvisable that such officers should act, I think I ought to dispose of the questions raised by both sides, relying on the maxim *ampliare jurisdictionem*, and leave to a higher tribunal the limitation of my judicial powers.

In *McVean* v. *Tiffin*, 13 A. R. 1, it was held that a lien-holder had no priority over a mortgagee who had obtained his mortgage while the work was in progress, and had registered it prior to the registration of the lien of the plaintiff-mechanic. In *Wanty* v. *Robins*, 15 O. R. 474, the rule laid down in that case was construed to apply only to innocent purchasers or mortgagees who had not actual notice of the lien of the mechanic at the time they paid the money and registered the deed or mortgage.

This then brings this case down to the question whether the mortgagee, McCausland, had actual notice of the plaintiff's lien.

In *Rose* v. *Peterkin*, 13 S. C. R. 677, Strong, J., . . . held that notice which merely puts a party on inquiry as to the facts of which it is material he should have knowledge, is clearly insufficient to postpone a registered instrument. And in *Richards* v. *Chamberlain*, 25 Gr. 402, Spragge, C., held that it would be holding mortgagees to a stricter course than lien-holders if mortgagees were to be taken to have notice of a lien merely because they saw the the work being done and materials for it furnished.

There is evidence that the defendant McCausland was told that the contracts were let and the work on the buildings was going on, but there is no evidence that he had actual notice that this plaintiff was furnishing the materials or that any moneys were due to him in respect of the materials for which he now claims a lien. The evidence as to notice shews, at most, only

constructive notice, and is, I think, insufficient to affect his title under the cases to which I have referred; and I must therefore hold that the defendant McCausland's mortgage is prior to the lien of the plaintiff.

On the argument as to the deed from the defendant Sinclair to his wife, I intimated that on the evidence it was void as against the plaintiff, and also that Mrs. Sinclair took it with actual notice of the plaintiff's claim.

See also *Re Wallis and Vokes*, 18 O. R. 8.

NEW BRUNSWICK.

In the Supreme Court.

[4TH JANUARY, 1892.

MERCHANTS' BANK OF HALIFAX v. ROATT.

Bill of exchange — Presentment for acceptance — Declaration, what it should allege—Demurrer—Leave to amend.

This was an action on a bill of exchange drawn by the defendant upon J. R., payable to his own order, ninety days after sight, and indorsed to the plaintiffs. The declaration, after stating the drawers and indorsers of the bill and that it was overdue, alleged as follows:—"and the said bill was duly presented for payment and was dishonoured, whereupon the same was duly protested for non-payment, of all of which the defendant had due notice but did not pay the bill."

The defendants demurred to the declaration on the ground that it did not allege that the bill had been presented for acceptance, nor that it had matured when it was presented for payment.

Held, that it was necessary to aver presentment in order to shew the time when the bill became due, and that the plaintiffs had a cause of action.

Demurrer allowed, with leave to the plaintiffs to amend the declaration on payment of costs.

McLEOD v. VAUGHAN.

Counsel fees—Action for.

Held, on appeal from the County Court of St. John, non-suiting the plaintiff, that an action will not lie to recover counsel fees; and that the case of *The Queen* v. *Doutre*, 9 App. Cas., does not apply to the practice in this Province.

Kerr v. *Burns*, 4 Allan 604, followed.

HAWTHORN v. DUNLOP.

REGINA v. STEVENS.

Arrest—Capias—Special bail—Discharge of debtor under C. S. c. 38, s. 7—Debtor not in close custody.

An application for a certiorari to quash an order made by the Judge of the County Court of Charlotte, discharging D., a debtor, from arrest. D. was arrested on a capias issued out of this Court in July, 1889, and gave the bond (A) required by C. S. c. 37, s. 7, and in August following put in special bail. The suit was tried in May, 1890, and a verdict found against him, and on the 31st of that month he applied to the Judge of the County Court of Charlotte for an examination under the provisions of C. S. c. 38, and an order for his discharge was made on the 9th June following. He had not been rendered in discharge of his bail; and the question raised was whether an order for the discharge of a debtor under C. S. c. 38, s. 7, can be made when the debtor is not in actual custody at the time of his examination.

Held, that the debtor in this case did not cease to be a debtor under arrest when he put in special bail; for then, in construction of law, he was in the custody of his bail, who were his gaolers; and they had the right to render him at any time. The rule for a *certiorari* was discharged.

M. McMonagle, for the applicant.

W. C. H. Grimmer, contra.

Ex parte EDGAR.

Canada Temperance Act—Summary conviction—Second offence—R. S. C. c. 105, s. 115 (d)—Date of information—Necessary allegation in conviction—Certificate of previous offence—What may be proved by it.

Edgar was convicted on 14th August for unlawfully selling intoxicating liquor between the 10th and 28th days of July preceding, and fined $100 and costs. The conviction stated that it appeared to the magistrate that the defendant had been previously convicted on the 22nd July previous for selling liquor between the 20th June and 9th July last, and fined $50.

A certificate of the previous conviction was proved, which also stated that the information for the first offence had been laid on 9th July last.

Held, that the information for the first offence might have been laid on the 9th July, the alleged sale having been between that day and the 20th June, but it could have been laid at any time within three months after the 8th July. The evidence showed that the sale for which the defendant was convicted in August was on the 13th July, but, as there was no evidence that the information for the first offence was laid before that day, *non constat* that both offences may not have been committed on the same day. If so the defendant would not, according to s. 115, s-s. (*d*), be liable for the increased penalty for a second offence, and, as this was left in doubt, the present conviction could not be sustained.

Rule absolute for a *certiorari*.

J. A. Vanwart, Q.C., for the applicant.

J. W. McCurdy, contra.

Ex parte EDWARDS.

Canada Temperance Act—Summary conviction—Fifth offence—R. S. C. c. 106, s. 115 (f.), construction of—"Shall," when directory—Only one second offence—Certiorari.

Edwards was convicted on 15th May, 1891, for unlawfully keeping intoxicating liquor for sale, between 1st March and 28th April last, contrary to the second part of the Canada Temperance Act, being his fifth offence, and was adjudged to

imprisonment for two months. The following previous convictions were proved, viz.:—(1) A conviction on 10th June, 1882, for selling, and a fine of $50; (2) a conviction for a second offence on the 30th July, 1888, and a fine of $100; (3) another on the 9th April, 1889, for a third offence with two months' imprisonment; and (4) another on the 1st April, 1890, for a fourth offence with like imprisonment.

The defendant proved four convictions for the first offences made respectively in March, 1887, January, 1889, December, 1889, and February, 1890, and also that a rule *nisi* for *certiorari* had been applied for to remove into this Court the conviction for the fourth offence, and that no decision of the Court had yet been given on that application, and contended that the defendant, having been convicted in February, 1890, for a first offence, after having been previously convicted for a first offence, could not by the next conviction, on 1st April, 1890, be found guilty of a fourth offence; that the numbering of the offences must be counted from the conviction of February, 1890; and that therefore the conviction of 1st April, 1890, could only be treated as a second offence; and relied upon R. S. C. c. 106, s. 115, s-s. *(f)*, in support of this contention.

Held, per ALLEN, C.J., KING, FRASER, and TUCK, JJ.; PALMER, J., dissenting; that the word "shall" in s-s. *(f)* ought not to be construed as imperative, because the context of s. 115 requires a different construction; that the section gives the magistrate a discretion to convict as for a first offence without regard to the number of convictions which have been previously made against the party, and that after a conviction or convictions under the section the magistrate is not bound to commence the counting of the offences *de novo* from the last conviction, but has a right to treat the case then before him as a third or fourth offence as the case may be, and as was done in this case; that there is no authority in the Act to make two convictions for a second offence; the power, where the regular order is departed from, is to treat the offence as a first offence.

Rule for *certiorari* discharged.

J. A. Vanwart, Q.C., for the applicant.

J. W. McCurdy, contra.

[ALLEN, C.J., 5TH JANUARY, 1892.

NEW BRUNSWICK RAILWAY COMPANY v. KELLY.

Injunction—Equity practice—Motion for interim injunction where no bill filed or summons issued—Motion refused and no further proceedings taken —Motion to dismiss for want of prosecution—Nothing to dismiss.

This was an application to have the plaintiffs' bill in this cause dismissed for want of prosecution. In December, 1889, the plaintiffs applied for an interim injunction to restrain the defendant from proceeding in two actions of trespass against B. and T. respectively. The application was made upon a bill and affidavits, no summons having been issued, and the injunction was refused with costs. The costs were taxed in May, 1890, and paid; and in October, 1891, the defendant gave notice of the present application. Neither the bill nor the affidavits on which the injunction was applied for had been filed, nor had any proceedings been taken in the suit by the plaintiffs since the injunction was refused. On the 16th October, 1891, the day on which the defendant gave notice of this application, an appearance was filed in the suit. The plaintiffs' answer to this application was that there was no cause in Court, no summons having been issued, and the bill not having been filed.

Held, that it was the clear intention of the Equity Act, 53 V. c. 4, that there should be a summons served in every case which is to be prosecuted, generally before the bill is filed, but in cases where an injunction is granted before summons, then forthwith after the granting of the injunction. As there is no direction in the Act that a summons should be issued on an application for an injunction order, founded on the facts stated in the bill, being refused, the fair construction of the Act is that no summons is necessary unless the applicant for an injunction desires to prosecute the suit. The mere application for an injunction as in this case was not the commencement of a suit. Application dismissed with costs.

Blair, A.-G., and *J. A. Vanwart*, Q.C., for the plaintiffs.

George F. Gregory, Q.C., and *C. E. Duffy*, for the defendant.

NEW BRUNSWICK RAILWAY CO. AND BROWN v. KELLY.

Injunction—Equity practice—Motion for interim injunction refused—Appeal from refusal—Motion to dismiss suit for want of prosecution—No necessity for proceeding with suit pending motion and appeal.

An application was made by the plaintiffs in June, 1890, for an interim injunction to restrain the defendant from proceeding in an action of trespass against the plaintiff Brown. The matter stood over pending the decision of the Supreme Court on a motion for a new trial in the action of *Kelly* v. *Brown*; and after judgment was given in that case, the injunction was refused with costs, on the 15th August, 1891. The plaintiffs then took out a summons calling on the defendant to show cause why the taxation of costs in the order refusing the injunction should not be stayed until the plaintiffs had an opportunity of appealing from the order of 15th August, and in the meantime staying the taxation of costs and all proceedings in the matter. Notice of appeal was served on 10th October, 1891, according to the Equity Act, 53 V. c. 4, s. 105, and the plaintiffs on that day issued a summons in the present case, and the defendants filed an appearance on 16th October, and on the same day gave notice of an application to dismiss the plaintiff's bill for want of prosecution. On 21st October the plaintiffs filed the bill and affidavits on which they had applied for the injunction. The defendants contended that the summons should have been issued immediately after the refusal of the injunction; that the plaintiffs had lost the benefit of their bill by not proceeding with due diligence; and that they could not regain it by afterwards issuing the summons, the defendant's right to apply to dismiss the bill having matured before the summons was issued.

Held, that the object of the injunction was to restrain the defendant from exercising his legal right to the property in dispute until the plaintiffs' alleged equitable right had been determined. The injunction having been refused, and the plaintiffs having appealed from the order refusing it, it seemed an extraordinary practice to compel the plaintiffs to proceed with the suit until the validity of that order which was now before the Court had been determined. The plaintiffs certainly were not bound to issue the summons while the question of granting the

injunction was pending, nor pending the appeal, and were therefore not in default on 16th October, the date of the application.

Application dismissed with costs.

Blair, A.-G., and *J. A. Vanwart*, Q.C., for the plaintiffs.

George F Gregory, Q.C., and *C. E. Duffy*, for the defendant.

[PALMER, J., 2ND JANUARY, 1892.

BOYD v. BANK OF NEW BRUNSWICK.

Banks and banking—Shares of bank stock held by deceased person—Injunction to compel transfer of shares to executor—Shares specifically devised—The Bank Act, R. S. C. c. 120, ss. 29, 30, 32, 34, 35.

B. held 26 shares of stock of the above bank, registered in her name at the time of her death. Probate of her will was granted to the plaintiff, who wished to sell and dispose of the shares and have the bank assign and transfer the same to the purchasers under ss. 29 and 30 of the Bank Act. He then made and filed with the bank the declaration provided for by s. 32 of the Act, and also filed a copy of the probate of the will showing that he was executor, and required the bank to transfer the stock to him as such, which they refused to do, on the ground that by the will the stock was specifically bequeathed to be divided among certain legatees. The plaintiff then applied for a mandatory injunction to compel the transfer, and the question raised was whether the bank was compelled to do so without the consent of the legatees and *cestuis que trustent*.

Held, that by R. S. C. c. 120 it was the duty of the bank to make the transfer, where the provisions of ss. 32, 34, and 35 had been complied with, and that there was no obligation on the bank to see that the bequests of the will were carried out by the executor.

MANITOBA.

In the Queen's Bench.

[TAYLOR, C.J., 6TH JANUARY, 1892.

ALLOWAY v. CAMPBELL.

Real Property Act—Plaintiff in issue non-suited—Subsequent proceedings—Costs.

Application under the Real Property Act. Alloway took proceedings to bring certain lands under the provisions of the Real Property Act, 1889. Thereupon Campbell and others filed a caveat, which they followed up by a petition claiming that they were owners of the lands, and praying that it might be declared that they were entitled to an estate in fee simple in the lands. This was met by an affidavit that the caveatee Alloway claimed to be the owner of the lands under a tax deed. An order was made for the trial of an issue, Alloway being the plaintiff and Campbell and others defendants, and by the order the question of costs and all further questions were reserved until after the trial of the issue. On the trial the plaintiff was non-suited, and a motion before the full Court to set aside the non-suit was refused.

The defendants then applied for an order, in accordance with the prayer of the petition, declaring them to be entitled to an estate in fee simple in the lands, and for payment of their costs of the proceedings. After the motion to set aside the non-suit had been refused, the plaintiff, under s. 46 of the Real Property Act, 1889, withdrew his application.

Held, that the caveators were entitled to an order for the payment of their costs. The order should declare that the issue directed had been tried, that the caveatee was non-suited, and order him to pay the caveators their costs. No further order could be made; the caveators had not established their

title, and the district registrar could not issue a certificate of title to them, as there was no application pending before him.

Cumberland, for the plaintiff, the caveatee.

C. P. Wilson, for the defendants, the caveators.

[KILLAM, J., 11TH JANUARY, 1892.

HADDOCK v. RUSSELL.

County Court suit—Verdict of jury for defendants set aside by Judge and verdict entered for plaintiff—Appeal refused—Exercise of discretion.

This was an action of replevin in a County Court, to recover a sewing machine claimed by the defendants, mother and daughter.

The plaintiff identified the machine and gave evidence that he had "sold" it to the daughter under an agreement produced. The agreement was what is known as a hire receipt, by which the daughter acknowledged to have "hired" of the plaintiff a sewing machine to be paid for by instalments; on default in payment the plaintiff was to be at liberty to retake the machine, and until full payment was made no title was to pass.

On default of payment the plaintiff demanded the machine, when the mother claimed to have seized it on some old claim against him. The only defence set up was that of a set-off for the mother's claim, which was stated to have been assigned to the daughter.

The action was tried by a jury, who found a verdict for the defendants. This verdict was set aside by the County Court Judge and judgment ordered to be entered for the plaintiff.

The defendants subsequently obtained a summons from a Judge of the Court of Queen's Bench, to show cause why they should not be allowed to appeal, claiming principally that the Judge of the County Court exceeded his powers in directing the entry of judgment instead of granting a new trial.

Held, that the defendants' contention was correct.

It is within the province of a jury to disbelieve the evidence for one party or the other, and to give a verdict for the party who, upon the face of the evidence, should not succeed; and if

the jury exercise its power in this respect unreasonably the only remedy is the granting of a new trial.

A party is not entitled to succeed where the trial is by jury, unless there is a verdict of a jury in his favour.

The alleged set-off could not possibly constitute any defence. Under the circumstances it would not be in the interests of justice to give the defendants an opportunity of pursuing this litigation longer, and of putting themselves and the plaintiff to further expense.

Application refused, but as it was so done in the exercise of discretion, when the defendants were technically in the right, no costs were allowed.

Andrews, for the plaintiff.
Haggart, for the defendants.

[19TH JANUARY, 1892.

BRITISH LINEN CO. v. McEWAN.

Foreign judgment—Action on—Pleas—Demurrer—Defences that might have been pleaded to the original cause of action.

Action upon a judgment of the Court of Sessions for Scotland. Demurrer to the defendant's pleas. The third plea alleged that the defendant was not at the time of the commencement of the suit in which the alleged judgment was recovered or at any time thereafter, previous to the recovery of the alleged judgment, resident within the jurisdiction of the said Court or within Scotland; he was not served with any process or proceeding in the suit; nor did he appear; nor had he before the recovery of the alleged judgment any notice or knowledge of any process; nor had he any opportunity of defending himself.

Held, bad. It could not be distinguished from the ninth plea in *Fowler* v. *Vail*, 27 C. P. 417; 4 A. R. 267. The onus is upon the defendant to negative his liability to be bound by the judgment of the foreign Court, and this is not sufficiently done by alleging want of notice of the proceedings and denying residence within the jurisdiction of that Court at the commencement of the original action or thereafter.

The fourth plea alleged that the judgment was not a final judgment nor was it a judgment upon which the plaintiffs' claim in this action or any part thereof could be sustained.

Held, that this plea should have been at once struck out, if application had been made for the purpose. In so far as it contained any answer to the declaration, the same defence was raised by the general issue; and by the attempt in the last portion of the plea to raise a defence, the plea appeared to be double. However, neither of these objections was open upon general demurrer; and the plea was sustained.

The sixth plea alleged that the cause of action in respect of which the alleged judgment was recovered did not accrue within six years before the commencement of the suit in the declaration mentioned, nor within six years before this action.

Held, a good plea.

By 48 V. c. 15, s. 45, s-s. 2, it is provided that "a defendant in any action upon a judgment obtained in any Court of the Province, or upon a foreign judgment, may plead to the action on the merits, or set up any defence which might have been pleaded to the original cause of action for which such judgment has been recovered."

Held, that the section must be taken to mean a defence which might be set up in the Courts in Manitoba to the original cause of action. The more natural view is that it refers to a defence that could have been raised here, rather than to one that would have been available abroad. The enactment gives the right to raise all defences that might have been raised here in an action on the original claim.

Tupper, Q.C., and *Phippen*, for the plaintiffs.

Richards and *Bradshaw*, for the defendant.

Charles Farley Harris
Library No.

Supreme Court of Canada.

ONTARIO.] [16TH NOVEMBER, 1891.

REGINA v. COUNTY OF WELLINGTON.

Constitutional law—Validity of Dominion Acts—31 V. c. 17—33 V. c. 40—Banking and incorporation of banks—Bankruptcy and insolvency—Taxation—Exemption—Crown lands—Beneficial interest of Crown.

The Bank of Upper Canada was insolvent when the British North America Act was passed, and all its property and assets had been transferred to trustees. By 31 V. c. 17 the Dominion Parliament ratified the assignment, and constituted the trustees a body corporate with power to carry on the business of the bank as far as was necessary for winding up the same. By 33 V. c. 40 the same Parliament transferred all the property and assets of the bank to the Dominion Government. Subsequently a piece of land included in the assets was sold by the Government and a mortgage taken for the purchase money. This land was assessed by the municipality in which it was situate and sold for unpaid taxes. In an action to set aside this tax sale:—

Held, affirming the judgment of the Court of Appeal, 17 A. R. 421, and of the Queen's Bench Divisional Court, 17 O. R. 615, that these Acts of the Dominion Parliament were *intra vires*.

Per RITCHIE, C.J.—Parliament, having legislative jurisdiction over "banking and the incorporation of banks," and over "bankruptcy and insolvency," could pass the Acts in question.

Per STRONG, TASCHEREAU, and PATTERSON, JJ.—The right of the Dominion Parliament to pass the Acts cannot be referred to its right to legislate with respect to "banking and the incorporation of banks," but is derived from its jurisdiction over "bankruptcy and insolvency."

Held, also, that the Crown having a beneficial interest in the lands on which it held a mortgage, such lands were exempt from taxation and the tax sale was invalid.

Bain, Q.C., for the appellants.

H. D. Gamble, for the respondent.

QUEBEC.] [6TH NOVEMBER, 1891.

DAWSON v. DUMONT.

Appeal—Jurisdiction—Action in disavowal—Prescription—Appearance by attorney—Service of summons—C. S. L. C. c. 83, s. 44.

In an action brought in 1866 for the sum of $800 and interest at twelve-and-a-half per cent. against two brothers, J. S. D. and W. McD. D., being the amount of a promissory note signed by them, one copy of the summons was served at the domicil of J. S. D. at Three Rivers, the other defendant W. McD. D. then residing in the State of New York. On the return of the writ the respondent filed an appearance as attorney for both defendants, and proceedings were suspended until 1874, when judgment was taken; and in December, 1880, upon the issue of an alias writ of execution, W. McD. D., the appellant, having failed in an opposition to judgment, filed a petition in disavowal of the respondent. The disavowed attorney pleaded *inter alia* that he had been authorized to appear by a letter signed by J. S. D. saying "be so good as to file an appearance in the case to which the enclosed has reference, etc."

The petition in disavowal was dismissed. On appeal to the Supreme Court of Canada, the respondent moved to quash the appeal, on the ground that the matter in controversy did not amount to the sum of $2,000.

Held, 1st, that as the judgment obtained against the appellant in March, 1874, on the appearance filed by the respondent, exceeded the amount of $2,000, the judgment on the petition for disavowal was appealable.

2nd. That there was no evidence of authority given to the respondent or of ratification by the appellant of the respondent's act; and therefore the petition in disavowal should be maintained.

3rd. Following *McDonald* v. *Dawson*, Cassel's Dig. p. 322, and 11 Q. L. R. 181, that the only prescription available against a petition in disavowal is that of thirty years.

4th. That where a petition in disavowal has been served on all parties to the suit, and is only contested by the attorney whose

authority to act is denied, the latter cannot on an appeal complain that all parties interested in the result are not parties to the appeal.

The appeal was allowed with costs.

Irvine, Q.C., and *Robertson*, for the appellant.

McLean, for the respondent.

[10TH NOVEMBER, 1891.

HURTUBISE v. DESMARTEAU.

Appeal—Supreme and Exchequer Courts amending Act, 1891, s. 3—Appeal from Court of Review.

By s. 3 of the Supreme and Exchequer Courts Amending Act of 1891, an appeal may lie to the Supreme Court of Canada from the Superior Court in Review, Province of Quebec, in cases which by the law of the Province of Quebec are appealable direct to the Judicial Committee of the Privy Council.

A judgment was delivered by the Superior Court in Review at Montreal in favour of D., the respondent, on the same day on which the amending Act came into force. On a motion by D. to quash an appeal to the Supreme Court of Canada taken by H.:—

Held, that the appellant not having shown that the judgment was delivered subsequent to the passing of the amending Act, the Court had no jurisdiction.

Quære, whether an appeal will lie from a judgment pronounced after the passing of the amending Act in an action pending before the change of the law.

The appeal was quashed with costs.

Geoffrion, Q.C., for the motion.

Charbonneau and *Brosseau*, contra.

[16TH NOVEMBER, 1891.

BROSSARD v. DUPRAS.

Composition—Loan to effect payment—Secret agreement—Failure to pay—Arts. 1039, 1040, C. C.

On the 20th December, 1883, the creditors of one L. resolved to accept a composition payable by his promissory notes at four, five, and twelve months. At the time L. was indebted to the Exchange Bank, then in liquidation, who did not sign the composition deed, in a sum of $14,000. B. and others, the appellants, were at that time accommodation indorsers for $7,415 of that amount, and held as security a mortgage dated 5th September, 1881, on L.'s real estate. The bank having agreed to accept $8,000 cash for their claim, B. *et al.*, on the 11th January, 1884, advanced $8,000 to L., and took his promissory notes and a new mortgage for the amount, having discharged and released on the same day the previous mortgage of the 5th September, 1881. This new transaction was not made known to D. *et al.*, who on the 14th January, 1884, advanced a sum of $8,000 to L. to enable him to pay off the Exchange Bank, and for which they accepted L.'s promissory notes. L., the debtor, having failed to pay the second instalment of his notes, D. *et al.*, who were not originally parties to the deed, brought an action to have the transaction between L. and the appellants set aside and the mortgage declared void on the ground of having been granted in fraud of the rights of the debtor's creditors.

Held, reversing the judgments of the Courts below, that the agreement by the debtor L. with the appellants was valid, the debtor having at the time the right to pledge a part of his assets to secure the payment of a loan made to assist in the payment of his composition: RITCHIE, C.J., and TASCHEREAU, J., dissenting.

Per FOURNIER, J., that as the mortgage sought to be set aside had been registered on the 18th January, the respondent's right of action was prescribed at the expiration of one year from that date: Art. 1040, C. C.

The appeal was allowed with costs.

Geoffrion, Q.C., and *Beausoleil*, for the appellants.

Ouimet, Q.C., for the respondents.

HUS v. COMMISSAIRES D'ECÓLES DE STE. VICTOIRE.

Mandamus—Establishment of new school district—School visitors—Superintendent of education—Jurisdiction of, upon appeal—Approval of three visitors—40 V. c. 22, s. 11 (P. Q.)—R. S. P. Q., Art 2055.

Upon an application by H., the appellant, for a writ of mandamus to compel the respondents to establish a new school district in the parish of Ste. Victoire, in accordance with the terms of a sentence rendered on appeal by the superintendent of education, under 40 V. c. 22, s. 11, (P. Q.), the respondents pleaded *inter alia* that the superintendent had no jurisdiction to make the order, the petition in appeal to the superintendent not having been approved of by three qualified visitors. The decree of the superintendent alleged that the petition was also approved of by one L., inspector of schools.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (appeal side), that the petition in appeal must have the approval of three visitors qualified for the municipality where the appeal to the superintendent originated, and as The Rev. A. Deserey, one of the three visitors who had signed the petition in appeal, was parish priest of an adjoining parish, and not a qualified school visitor for the municipality of Ste. Victoire, the sentence rendered by the superintendent was null and void.

TASCHEREAU, J., dissented on the ground that, as the decree of the superintendent stated that L., the inspector of schools, was a visitor, it was *prima facie* evidence that the formalities required to give the superintendent jurisdiction had been complied with: C. S. L. C. c. 15, s. 25.

Lacoste, Q.C., and *Germain*, for the appellant.

Geoffrion, Q.C., for the respondents.

HOLLAND v. ROSS.

Crown lands, P. Q.—Location tickets—Transfer of purchaser's rights—Registration of—Waiver by Crown—Cancellation of license—23 V. c. 2, ss. 18, 20—32 V. c. 11, s. 18—36 V. c. 8.

A location ticket of certain lots was granted to G. C. H. in 1868. In 1872 G. C. H. put on record with the Crown land department that, by arrangement with the Crown land agent, he had per-

formed settlement duties on another lot known as the homestead lot. In 1874 G. C. H. transferred his rights to the appellant, paid all moneys due with interest on the lots, registered the transfer under 32 V. c. 11, s. 18, and the Crown accepted the fees for registering the transfer and for the issuing of the patent. In 1878 the Commissioner cancelled the location ticket for default to perform settlement duties.

Held, that the registration by the Commissioner, in 1874, of the transfer to the respondent was a waiver of the right of the Crown to cancel the location ticket for default to perform settlement duties, and the cancellation was illegally effected.

The appeal was allowed with costs.

Lacoste, Q.C., and *Nicholls*, for the appellants.

Laflamme, Q.C., and *Robertson*, Q.C., for the respondent.

BENNING v. ATLANTIC AND NORTH-WEST RAILWAY COMPANY.

Arbitration and award—Expropriation under Railway Act, R. S. C. c. 109—Discretion of arbitrators—Award—Non-interference on appeal.

In a case of an award in expropriation proceedings it was held by two Courts that the arbitrators had acted in good faith and fairness in considering the value of the property before the railway passed through it, and its value after the railway had been constructed, and that the sum awarded was not so grossly and scandalously inadequate as to shock one's sense of justice.

On appeal to the Supreme Court of Canada,

Held, that the judgments should not be interfered with.

Laflamme, Q.C., and *Trenholme*, for the appellants.

Geoffrion, Q.C., and *H. Abbott*, Q.C., for the respondents.

QUEBEC, ETC., RAILWAY COMPANY v. MATHIEU.

Expropriation—R. S. Q. 5164, ss. 15, 16, 17, 18, 24—Award—Arbitrators—Jurisdiction of—Lands injuriously affected—43 & 44 V. c. 48 (P. Q.)—Appeal—Amount in controversy—Costs.

In a railway expropriation case the respondent in naming his arbitrator declared that he "only appointed him to watch over the arbitrator of the company," but the company recognized him officially, and subsequently an award of $1,974.25 and costs for land expropriated and damages was made under Art. 5164, R. S. Q. The demand for expropriation as formulated in their notice to arbitrate by the appellants was for the width of their track, but the award granted damages for three feet outside of the fences on each side as being valueless. In an action to set aside the award,

Held, affirming the judgment of the Court below, that the appointment of the respondent's arbitrator was valid under the statute and bound both parties, and that in awarding damages for three feet of land injuriously affected on each side of the track the arbitrators had not exceeded their jurisdiction.

STRONG and TASCHEREAU, JJ., doubted whether the case was appealable, the amount in controversy, deducting the taxed costs, being under $2,000.

Irvine, Q.C., and *Bedard*, for the appellants.
Lasgrain, Q.C., for the respondent.

[17TH NOVEMBER, 1891.

PETERS v. QUEBEC HARBOUR COMMISSIONERS.

Contract—Engineer's certificate—Finality of—Bloc sum contract—Deduction—Engineers, powers of—Interest.

In a bulk sum contract for various works and materials, executed, performed, and furnished on the Quebec Harbour works, the contractors were allowed by the final certificate of the engineers a balance of $52,011. The contract contained the ordinary powers given in such contracts to the engineers to

determine all points in dispute by their final certificate. The work was completed and accepted by the commissioners on the 11th October, 1882, but the certificate was only granted on the 4th February, 1886. In an action brought by the contractors, the appellants, for $181,241 for alleged balance of contract price and extra work:—

Held, 1st, that although the certificate of the engineers was binding on the parties, and could not be set aside as regards any matter coming within the jurisdiction of the engineers, yet that such certificate could be corrected or reformed by the Court where it was shown that the engineers had improperly deducted from the bulk sum contract price the sum of $32,100 for an alleged error in the calculation of the quantities of dredging to be done, as stated in the specification, and the quantities actually done.

2nd. That interest could not be computed from an earlier date than from the date of the final certificate fixing the amount due to the contractors under the contract, viz., 4th February, 1886.

STRONG and GWYNNE, JJ., were of opinion that the certificate could have been reformed as regards an item for removal of sand erroneously paid for to other contractors by the commissioners and charged to the plaintiffs.

The appeal and cross-appeal were allowed with costs.

Osler, Q.C., and *W. Cook*, Q.C., for the appellants.

Irvine, Q.C., and *Stuart*, Q.C., for the respondents.

PETRY v. CAISSE D'ECONOMIE.

Bank stock—Substituted property—Registration—Arts. 931, 938, 939, C. C.—Shares in trust.

The curator to the substitution of W. Petry paid to the respondents the sum of $8,632 to redeem 84 shares of the capital stock of the Bank of Montreal entered in the books of the bank in the name of W. G. P. in trust, and which the said W. G. P., one of the *grevés* and manager of the estate, had pledged to the respondent for advances made to him personally. H. P. *et al.*,

appellants, representing the substitution, by their action sought to have refunded the money which they alleged The Rev. J. P., one of them, had paid by error as curator, to redeem shares belonging to the substitution. The shares in question were not mentioned in the will of William Petry, and there was no inventory to show that they formed a part of the estate, and no *acte d'emploi* or *remploi* to show that they were acquired with the assets of the estate.

Held, affirming the judgment of the Court below, *per* RITCHIE, C.J., and FOURNIER and TASCHEREAU, JJ., that the debt having been paid with full knowledge of the facts, the plaintiffs could not recover.

Per STRONG and FOURNIER, JJ., that bank shares cannot be held, as regards third parties in good faith, to form part of substituted property, on the ground that they have been purchased with moneys belonging to the substitution, without an act of investment in the name of the substitution and a due registration thereof: Arts. 931, 938, 939, C. C.; PATTERSON, J., dissenting.

Irvine, Q.C., and *Stuart*, Q.C., for the appellants.

Hamel, Q.C., and *Fitzpatrick*, for the respondents.

NEW BRUNSWICK.] [22ND JUNE, 1891.

McKEAN v. JONES.

Parties—Action for account—Demurrer—Res judicata.

C., who had an action pending on certain policies of insurance, assigned to the defendant all his interest in the action and the policies, and being indebted to B. & Co., he gave them an order on the defendant directing the latter to pay B. & Co. the balance coming from the insurance claim after paying what was due to the defendant himself. B. & Co. indorsed the order and delivered it to the plaintiff, who presented it to the defendant, and the defendant accepted it by writing his name across the face. B. & Co. afterwards gave the plaintiff a written document stating that, having been informed that the order was not negotiable by

indorsement, in order to perfect the plaintiff's title, they assigned and transferred to him the order and made him their attorney, in their name, but for his own benefit, to collect the same.

The insurance moneys having come into the hands of the defendant, he refused to give the plaintiff an account or pay what was due to him, but stated that prior claims had exhausted the money. In an action for an account and payment the defendant demurred, claiming that both C. and B. & Co. should be made parties. The demurrer was overruled and the same objection was raised in the answer. On appeal the question of want of parties was the only one argued.

Held, affirming the judgment of the Court below, STRONG, J., dissenting, that the question was *res judicata* by the judgment on the demurrer; if not, the judgment was right, as neither C. nor B. & Co. were necessary parties.

Blair, A.-G., and *Hazen*, for the appellant.

Weldon, Q.C., for the respondent.

MANITOBA.] [16TH NOVEMBER, 1891.

RURAL MUNICIPALITY OF CORNWALLIS v. CANADIAN PACIFIC RAILWAY COMPANY.

Assessment and taxes—Exemption from taxation—Lands sold or occupied—Crown lands—Locus.

By the charter of the C. P. R. Co. the lands of the company in the North-West Territories, until sold or occupied, are exempt from Dominion, Provincial, or municipal taxation, for twenty years after the grant thereof from the Crown.

Held, affirming the judgment of the Court of Queen's Bench for Manitoba:—

1. That an agreement to sell any of such lands, so long as it has not been completed and a conveyance executed, does not take away the exemption; to effect which the land must be actually sold.

2. The exemption attaches to land allotted to the company before as well as after the patent is issued by the Crown.

3. Lands situate in the North-West Territories do not lose the exemption by being afterwards incorporated within the boundaries of the Province of Manitoba on an extension thereof.

Robinson, Q.C., and *Crawford*, for the appellants.

S. H. Blake, Q.C., for the respondents.

BERNARDINE v. MUNICIPALITY OF NORTH DUFFERIN.

Contract—Municipal corporation—Capacity to contract except under seal.

G. in answer to advertisement tendered for a contract to build a bridge for the municipality of North Dufferin, and his tender was accepted by resolution of the municipal council. No by-law was passed authorizing G. to do the work, but the bridge was built and partly paid for. A balance remained unpaid, for which B., to whom G. had assigned the contract, notice of the assignment having been given to the council in writing, brought an action. This balance had been attached by a creditor of G., but the only defence urged to the action was that there was no contract under seal, in the absence of which the corporation could not be held liable. On the trial there was produced a document signed by G. purporting to be the contract for the building of the bridge. It had no seal and was not signed by any officer of the municipality. The duplicate was alleged to have been mislaid in the office of the clerk of the municipality.

Held, reversing the judgment of the Court of Queen's Bench for Manitoba, 6 Man. L. R. 88, RITCHIE, C.J., and STRONG, J., dissenting, that the work having been executed and the corporation having accepted it, and enjoyed the benefit of it, they could not now be permitted to raise the defence that there was no liability on them because there was no contract under seal.

Tupper, Q.C., for the appellant.

Osler, Q.C., and *Martin*, A.-G., for the respondents.

[17TH NOVEMBER, 1891.

MUNICIPALITY OF MORRIS v. LONDON & CANADIAN L. & A. CO.

Appeal—Final judgment—Specially indorsed writ—Summary judgment on.

In an action against a municipality to recover the amount of certain debentures, the writ of summons was specially indorsed, and the defendants having appeared, a summons was taken out according to the practice in the Court of Queen's Bench in such cases, calling upon the defendants to shew cause at a day named, why judgment should not be signed against them summarily. On the return of the summons the Judge before whom it was returnable, after hearing the parties, ordered that the plaintiffs should be at liberty to enter up judgment in the action for the amount indorsed on the writ. This order was affirmed on appeal to the full Court, and a further appeal was sought by the defendants to the Supreme Court of Canada.

Held, that the judgment sought to be appealed from was not a final judgment within the meaning of the Supreme Court Act, and no appeal therefrom would lie.

The appeal was quashed with costs.

Chrysler, Q.C., for the motion.

Hogg, Q.C., and *Crawford*, contra.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [8TH JANUARY, 1892.

WESTERN ASS'CE. CO. v. ONTARIO COAL CO.

Maritime law—General average contribution—Salvage—Cargo left in peril for benefit of vessel—Expense of subsequent efforts to save both vessel and cargo.

A vessel loaded with coal stranded. The owners of the cargo desired to take the coal out, which could have been done at small expense, but the underwriters of the ship refused to permit this,

as it would much increase the risk to the vessel. Extraordinary expense was gone to for the purpose of saving both vessel and cargo, and most of the cargo was saved; but the vessel was a total loss.

Held, that the owners of the cargo were only liable to pay a reasonable amount for the cost of saving the coal, and that there was no claim for general average against the coal saved.

Judgments of BOYD, C., 19 O. R. 462, and of the Queen's Bench Divisional Court, 20 O. R. 295, affirmed.

Wallace Nesbitt, for the appellants.

Delamere, Q.C., for the respondents.

In re McGUGAN v. McGUGAN.

Solicitor and client — Bill of costs — Application by ratepayer for taxation of bill paid by school board—R. S. O. c. 147, ss. 32, 42—Rule 1229.

An individual ratepayer of a school section is not, merely by reason of his having to contribute as a ratepayer, entitled to obtain an order for taxation of a bill of costs delivered to and paid by the school board of the section either under R. S. O. c. 147, ss. 32 and 42, or under Rule 1229.

Judgment of the Queen's Bench Divisional Court, 21 O. R. 289, reversed.

Glenn and *Crothers*, for the appellants.

J. A. Robinson, for the respondent.

High Court of Justice.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 23RD DECEMBER, 1891.

In re HESSIN AND LLOYD.

Dominion Electoral Franchise Act—Revising officers—Prohibition—Jurisdiction of the High Court of Justice.

There is no jurisdiction in the High Court of Justice to issue a prohibition to a revising officer to compel him to abstain from performing any duty under the Dominion Electoral Franchise Act.

The legislation in regard to such matters does not trench upon nor is the question one of "property and civil rights in the province."

Re Simmons and Dalton, 12 O. R. 505, not followed.

W. R. Meredith, Q.C., for Hessin.

Lash, Q.C., for Lloyd.

[22ND JANUARY, 1892.

In re WATSON'S TRUSTS.

Settled estates—Lease—Power to renew for further term—Extent of—19 & 20 V. c. 120 (Imp.)—53 V. c. 14 (O.)—Construction of words "usual custom."

In applying the Imperial Settled Estates Act of 1856, 19 & 20 V. c. 120, to Canadian affairs, the words "usual custom" in s. 2 must be satisfied with something less than the immemorial custom of England. It is satisfied by proof of a well recognized method or usage of framing building leases in a given locality.

Held, under that statute and 53 V. c. 14 (O.) that power to lease with extended right of renewal might be granted up to 999 years.

D. E. Thomson, Q.C., for the petitioners.

J. Hoskin, Q.C., for the infants and unborn issue.

[27TH JANUARY, 1892.

GAULT v. MURRAY.

Injunction—Undertaking as to damages—Dismissal of action at trial—Award of damages—Reference.

The jurisdiction to award an inquiry as to damages, or to assess damages without a reference, where an injunction has been granted and an undertaking as to damages taken, is a discretionary one to be exercised judicially and not capriciously. And where the trial Judge was, on the evidence, of opinion that no damage was proved, occasioned by the injunction as distinct from the detriment arising from the litigation whereby the defendant's title to the property in question was impeached, and where no additional evidence was before the Divisional Court:—

Held, that, under the circumstances, no reference as to damages should be ordered or damages awarded.

George Kerr, for the plaintiffs.

E. D. Armour, Q.C., for the defendant McIntosh.

[BOYD, C., 25TH JANUARY, 1892.

TILLIE v. SPRINGER.

Trustees and executors—Right of retainer—Devolution of Estates Act—Assignment for creditors—R. S. O. c. 124.

Under their father's will C. and W. were to receive a share of the proceeds of certain land to be sold on the death of the widow, who was still alive. They also owed the estate a certain debt, which by the will was to be payable in five yearly instalments from the death of the testator, in February, 1888.

In December, 1890, C. and W. made an assignment for the benefit of their creditors.

Held, that the effect of the assignment was by virtue of R. S. O. c. 124, s. 20, s-s. 4, to accelerate payment of the debt due from C. and W. to the estate.

2. That the executors, being also trustees of the land of which C. and W. were to receive shares when sold under the will, held security for their claim against C. and W., having, since the Devolution of Estates Act applied here, the right to retain C. and W.'s share under the will as against their debt to the estate. This security the executors and trustees should value pursuant to the Act respecting assignments for the benefit of creditors.

Bain, Q.C., for the plaintiff.

Du Vernet, for the defendant.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 4TH FEBRUARY, 1892.

In re BANK OF OTTAWA v. WADE.

Prohibition—Division Court—Judge reserving judgment without naming day or hour—Prejudice—Consent—Waiver.

The Court (GALT, C.J., and ROSE and MACMAHON, JJ.) affirmed the order of STREET, J., in Chambers, 11 Occ. N. 339, upon appeal therefrom by the claimant Gordon, holding that the assent of the appellant to the arrangement proposed by the Judge in the Division Court, that he should deliver his judgment when ready to do so without previously naming a day or time, took the case out of the rule laid down in *Re Tipling* v. *Cole*, 21 O. R. 276; and that there was therefore no ground for prohibition by reason of the provisions of s. 144 of the Division Courts Act, R. S. O. c. 51, not having been strictly observed.

C. J. Holman, for the appellant.

Aylesworth, Q.C., for the plaintiffs.

IN CHAMBERS.

[MEREDITH, J., 21ST JANUARY, 1892.

In re RODDY AND LEAH.

Insurance—Life—Benefit certificate in favour of wife—Claim by fiancee of deceased—Summary disposition of claim—Rule 1149—Issue.

An application by the Grand Council of the Canadian Order of Chosen Friends for an order directing the trial of an issue between Margaret Roddy and Joseph Leah, two claimants for the proceeds of an insurance certificate of $1,000 on the life of Samuel Leah, deceased. The certificate was on its face made payable to "his wife." The uncontradicted affidavit evidence shewed that the deceased was engaged to marry Margaret Roddy at the time he effected the insurance and up to the time of his death; that when insuring he had stated that he was to marry her in a short time and was insuring for her benefit; that he

gave her the certificate and that she always held it and had it at time of his death; that he had often declared it was a provision for her should anything happen him before or after marriage. Joseph Leah claimed as administrator of the estate of the deceased.

The Master in Chambers, holding that the issue was purely one of law and that Margaret Roddy had no legal claim to the moneys, made an order barring her claim.

MEREDITH, J., on appeal, held that it was not contemplated by Rule 1149 that such a case, involving such an amount and such nice questions of fact and law, should be summarily disposed of by the Master in Chambers in this way, and ordered that, unless the adverse claimants could agree to state facts for a special case to be submitted to a Divisional Court, an issue should be tried.

D. Armour, for the Order of Chosen Friends.

F. A. Anglin, for the claimant Roddy.

C. W. Kerr, for the claimant Leah.

[MR. WINCHESTER, 26TH JANUARY, 1892.

COOK v. COOK.

Interim alimony—Application for—Enlargement—Cross examination of wife on her affidavit.

This was an action by a wife against her husband for alimony.

The plaintiff moved before Mr. Winchester, sitting for the Master in Chambers, for an order for interim alimony, and in support of her motion filed her own affidavit, in which she swore to the marriage and that she had left the defendant's house, and that he was possessed of means, while she was utterly destitute; and in a general clause she verified the facts set out in the statement of claim, which alleged cruelty. The statement of defence neither admitted nor denied the marriage or the departure of the plaintiff from the defendant's house. The defendant in answer to the application for interim alimony, filed his own affidavit, denying the plaintiff's statement as to his means and the allegations of cruelty, but not otherwise contradicting the plaintiff.

Reesor, for the defendant, asked to have the motion enlarged in order to cross-examine the plaintiff on her affidavit.

F. A. Anglin, for the plaintiff, opposed the enlargement on the grounds that two of the material matters, viz., the marriage and the departure of the wife, were not in issue on the affidavits filed, and another, the extent of the husband's means, was within his own knowledge; and that the defendant had no right to cross-examine on the merits of the case.

MR. WINCHESTER ruled that the defendant was entitled to an enlargement of the motion in order to cross-examine the plaintiff, but that the cross-examination must be confined to questions as to her own means of support.

Subsequently, on the cross-examination, questions as to the defendant's means were also put without objection.

MANITOBA.

In the Queen's Bench.

[THE FULL COURT, 1ST FEBRUARY, 1892.

MACHRAY v. HIGGINS.

Will—Construction of—Annuity to widow—Income insufficient—Conversion—Power to mortgage.

Appeal from the decision of BAIN, J., 11 Occ. N. 317.

Decree affirmed, and appeal dismissed with costs.

CASE v. LAIRD.

Pleading—Action on contract under seal—Collateral agreement by parol—Admissibility.

Demurrer by the defendant to the plaintiffs' replication.

The plaintiffs declared upon a promissory note for $200 made by the defendant, due and payable on 1st January, 1891; also upon an agreement, under seal, for the purchase by the defendant from the plaintiffs of a separator for $915, to be paid for at the time of delivery, or by the payment in cash of $300, and the giving of three promissory notes, two of $200 each and one of $215; the plaintiffs alleged the delivery of the machine, the payment of $300, the failure of the defendant to make and deliver the promissory notes, and claimed that they were entitled to have the $200 due in January, 1891, paid, yet defendant made default, etc.

The defendant set up that, in consideration that he would sign and enter into the agreement set out in the declaration, and would make the cash payment of $300, and would make and deliver the three notes, the plaintiffs agreed to accept from him a second-hand separator for the price of $200, and give credit therefor upon the first of the notes; he then went on to allege the signing of the agreement, the giving of the notes, the delivery of the second-hand machine, the receipt and acceptance of it by the plaintiffs and the payment by the defendant before the note became due of $5.05, which sum, together with the second-hand machine, satisfied and discharged the plaintiffs' claim under the first count on the note. The defendant also claimed damages, by way of counter-claim, for the neglect and refusal of the plaintiffs to apply the purchase money of the second-hand separator in payment of the note, whereby the defendant lost the price of the second-hand separator and had been made liable for the immediate payment of the whole of the purchase price of the machinery.

The plaintiffs replied to the defendant's pleas and counter-claim, that the agreement set up by the defendant was not made by deed. To these replications the defendant demurred.

The plaintiffs then took exceptions to defendant's pleas and counter-claim, alleging them to be bad, because they alleged an agreement which contradicted, varied, and altered the agreement

contained in the deed set forth in the declaration, and did not show that the agreement relied on by the defendant was made by deed.

Held, that the agreement set up by the defendant did not appear to be inconsistent with, or in any way contradict or vary, the agreement set out in the declaration and relied on by the plaintiffs.

The agreement set up in the pleas was really an independent collateral agreement and the pleas were, or amounted to, pleas of accord and satisfaction. The agreement was really an independent collateral agreement, for a breach of which damages could be claimed.

It could not be said that the agreement under seal was in any way varied by the agreement set up by defendant, or that he was putting forward that agreement as a variation of the first agreement.

The demurrer to the plaintiffs' replication should be allowed with costs.

W. R. Mulock, Q.C., for the plaintiffs.

Howell, Q.C., for the defendant.

[1st February, 1892.

LONDON AND CANADIAN L. & A. CO. v. MUNICIPALITY OF MORRIS.

Final judgment—Summary order for—Application to full Court for rule nisi to reverse its own order—Special circumstances.

Two actions were brought by the plaintiffs against the defendants, one in July, 1890, and one in September, 1890, to recover the amount of certain debentures held by the plaintiffs.

In the first action an order was made by Killam, J., for immediate judgment. An appeal was taken to the full Court, which was dismissed on 14th February, 1891.

A further appeal was taken to the Supreme Court, but on 16th March, 1891, an application was made to quash the same, on

which application judgment was delivered on 17th November, 1891, quashing the appeal on the ground that the order appealed from was in the discretion of the Court below.

While the appeals in the first action were pending, the second action was running on, and on 5th May, 1891, the full Court reversed an order made by the referee giving the plaintiffs leave to sign final judgment, and on the new material which had been filed, the Court allowed the defendants to defend the second action. No declaration had been filed nor any other step taken in the second action since 5th May, 1891.

The defendants then moved before the full Court upon new material for a rule *nisi*, calling upon the plaintiffs to show cause why the orders of KILLAM, J., and of the full Court, made in the first (this) action, should not be rescinded, and the defendants let in to defend.

Rule refused, the Court holding that the new material set up an entirely new defence, and the first defence set up having failed, the case could not be tried on another defence.

Ewart, Q.C., and *Crawford*, for the defendants.

[TAYLOR, C.J., 27TH JANUARY, 1892.

RUDDELL v. GEORGESON.

Real Property Act—Adverse claims—Bill directed to be filed—Who to be plaintiff.

Application under the Real Property Act.

One Peel in 1882 entered into an agreement with the Dominion Government to purchase certain government lands. Part payment only was made.

The lands were put up for sale for taxes in 1887 and purchased by Ruddell, to whom a deed was issued in 1889.

In 1891 Georgeson bought the lands from Peel; he paid the balance due to the Government, and a patent was issued to him. Georgeson then applied for a certificate of title under the Real Property Act, when Ruddell filed a caveat, alleging that Georgeson was a trustee for Peel and that there had not been any *bona fide* sale; he claimed that the lands were properly assessable for

taxes; therefore his title was the best one; and he asked that Georgeson might be declared a trustee for him.

On the application for an issue to be directed, Ruddell claimed that he should be made defendant, as his tax deed, under the Act 54 V. c. 5, s. 9 (M.) was *prima facie* evidence of his title.

Held, that this was a matter in which a bill should be filed. As a general rule the caveator is to be plaintiff, but upon proper cause shown the Court may direct the caveatee to be plaintiff. In the present case the caveator should be plaintiff; he can file a bill to have the caveatee declared a trustee for him. That is the case he makes out by his petition, and it must be assumed to be the case on which he relies.

Howell, Q.C., for the caveator.

Tupper, Q.C., for the caveatee.

[28TH JANUARY, 1892.

WILLIAMS v. MAGEE.

Demurrer — Application to rehear demurrer in equity — Payment in of deposit.

The plaintiffs filed their bill to set aside a judgment as being a fraudulent preference. One of the defendants demurred for want of equity; the demurrer was overruled.

The defendant then set the case down by way of appeal to the full Court, but did not pay into Court the usual deposit. The referee, on motion of the plaintiff, made an order limiting a time for payment in of the deposit, and in default striking the case off the cause list. Against this order the defendant appealed, contending no deposit was necessary; the argument of a demurrer was not a hearing; and, by the English practice in force in Manitoba under 48 V. c. 15, (M.), it is only for the rehearing of a decree made at the original hearing of the cause, or upon further consideration, that a deposit is required. The cause was not at issue; and unless there had been a hearing, there could be no rehearing.

Held, that the appeal must be dismissed, with costs to the plaintiffs in any event.

By an order of the 25th June, 1724, it was directed that when any party shall be dissatisfied with the judgment of the Court, given upon the hearing of any cause, exception, plea, or demurrer, they do, if so advised, petition for a rehearing of such cause, exception, plea, or demurrer. See Beames' Orders, 334; Daniell's Pr., Perk. ed., 1620; Smith's Pr., ed. of 1837, vol. 2, p. 36.

By an order of 12th July, 1858, which afterwards became Con. Ord. 31, R. 8, the same petition of rehearing was required in the case of an order or decree made on a motion, as in the case of an ordinary rehearing.

Whenever, then, in England in 1870, the practice required a petition of rehearing to be presented for the purpose of having a decree or order reviewed, it is necessary here, before setting down a similar decree or order to be reheard before the full Court to pay in a deposit of $40: G. O. 317.

Hough, for the plaintiffs.

O'Reilly, for the defendant.

[1st February, 1892.

TAYLOR v. SHARP.

Mortgage suit—Decree for sale—Sale—Execution issued for balance—Petition to set aside sale as invalid—Matter for Court or Chambers.

The plaintiff in January, 1885, as assignee of a mortgage, obtained a decree for payment by the mortgagors, and in default for a sale of the mortgaged lands, with an order for payment by the defendants Crotty and Gerrie, the original mortgagees, of any deficiency, they having by the deed of assignment covenanted for payment of the mortgage money in case of default on the part of the mortgagors. Default having been made, the lands were sold, the report confirming the sale being dated 28th October, 1885. By his subsequent report, dated 6th March, 1886, the Master found the amount due the plaintiff, after giving credit for the purchase money realized on the sale, to be $9,246.41, and for this writs of execution were issued against Crotty and Gerrie.

These defendants then presented a petition in which they alleged that the mortgage in question was purchased for, and with the money of, the Ontario Investment Association, but the assignment was taken in the name of the plaintiff, then the manager of the company; after the final order for sale an application was made to the Court that the plaintiff might be at liberty to bid, which was refused; that thereupon the plaintiff's solicitor procured one Patton to attend and bid for the mortgaged lands, the auctioneer being instructed to knock them down to him; that Patton was declared the purchaser, and an order made vesting the land in him; that subsequently he conveyed the land to the president of the company, who conveyed to his successor; he subsequently died, leaving a will by which he directed his executors to hold the lands in trust for the company.

The petition further alleged that the plaintiff was merely a trustee for the company, and the land was purchased by Patton for the benefit of the company; that all the proceedings were taken *ex parte* and the petitioners had only recently discovered the facts.

The prayer of the petition was that it might be declared that the sale to Patton was void, and that no sale had been made, that the final report and the report on sale might be set aside and declared void, and that the writs of execution issued against the petitioners might be set aside with costs.

Counsel for the plaintiff contended that the application should have been made in Chambers, not in Court.

Held, that the practice must be governed by that which prevailed in England in July, 1870. There, the proceedings to set aside a sale, on the ground of fraud or improper conduct in the management of the sale, may be by motion or summons. If the matter can, in England, be brought in Court or in Chambers, it could not be said that the present application, made to the Court, was improperly so made. There was no practice by which a report made and confirmed could be set aside in Chambers.

The sale itself could not be set aside on the present application, because neither the mortgagors nor the assignee of the purchaser had been brought before the Court as respondents.

But the petitioners were entitled to an order setting aside the report of 6th March, 1886, settling the amount due the plaintiff,

and the writs of execution issued thereon: there would therefore be an order setting them aside with costs.

Ewart, Q.C., for the plaintiff.

Howell, Q.C., for the defendants Crotty and Gerrie.

TAIT v. BURNS.

Costs—Taxation—Revision—County Court Appeal — Discretion — Witness fees—Counsel fee to unqualified person.

Appeal from a County Court.

In February, 1891, a replevin suit was tried in the County Court of La Verandrye, which resulted in favour of the defendant, the costs being taxed *ex parte*, and the judgment signed in March. Subsequently, a transcript of the judgment was obtained and filed in the County Court of Selkirk, under which certain moneys due the plaintiff were garnished.

On 27th October the plaintiff obtained from the Judge of the County Court of La Verandrye a summons for the revision of the taxation of costs; the result of which was that the amount due from the plaintiff stood practically as it did before the revision. The plaintiff appealed under 50 V. c. 9, s. 243, as amended by 54 V. c. 2, s. 21.

The items objected to were:—First, an allowance made to a veterinary surgeon for his time and expenses, and to the defendant for his expenses accompanying him to examine the animal, the subject matter of the suit. Second, two items of witness fees which had not been paid the witnesses at the time of the taxation, nor so, far as appeared, up to the time of the appeal. Third, a sum of $8 allowed as a counsel fee to a person who was not a duly certified barrister or attorney.

Objections were taken that the matter was not an appealable one; that the revision was not applied for within a reasonable time; and that a transcript having been filed in the County Court of Selkirk before the revision took place, no further proceedings could be taken in the County Court of La Verandrye.

Held, that there may be an appeal on a question of costs where there is an error of law or a misapplication of a legal principle.

The objection that the revision was not applied for within a reasonable time was not open to the defendant. It was a matter for the County Court Judge, and if he chose to grant a summons, his discretion in doing so should not be interfered with.

By the statute 50 V. c. 9, s. 123, as amended by 54 V. c. 2, s. 18, the judgment appears to remain a judgment of the original Court, for the Judge of that Court can deal with it, even to setting it aside, and that after, by the filing of a transcript, it has become a judgment of the Court of Queen's Bench.

There was no power to make the allowance to the veterinary surgeon, or to the defendant for accompanying him when he went to examine the animal in question.

The item of $8 counsel fee was improperly allowed.

As to the two items of witness fees objected to, the Judge had clearly a discretion. Under the County Court Act, 1887, by the addendum to schedule C., it is said, "Before taxation of witness fees the fees must be actually paid unless the Judge otherwise orders." Whether they should be allowed or not, though unpaid, was entirely within his discretion, and it could not be interfered with.

The result was, that, as to the items of $18.90, reduced by the Judge to $16.90, and that of $8, the appeal was allowed; as to the other items it was dismissed.

The appeal partly succeeding and partly failing, no costs were given.

Baker, for the plaintiff.

Mathers, for the defendant.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Ch. D.] [8th January, 1892.

ATTORNEY-GENERAL FOR CANADA v. ATTORNEY-GENERAL FOR ONTARIO.

Constitutional law—Validity of 51 V. c. 15 (O.)—Royal prerogative—Power of pardon—Commuting and remitting sentences—Powers of Lieutenant Governors.

The Act 51 V. c. 5 (O.), which declares that in matters within the jurisdiction of the Legislature of the Province all powers, etc., which were vested in or exercisable by the Governors or Lieutenant-Governors of the several Provinces before Confederation, shall be vested in and exercisable by the Lieutenant-Governor of this Province, is valid and within the power of the Provincial Legislature to enact.

The power of commuting and remitting sentences for offences against the laws of this Province or offences over which the legislative authority of the Province extends, which by the terms of the Act is included in the powers above mentioned, does not affect offences against the criminal laws of this Province, which are the subject of Dominion legislation, but refers only to offences within the jurisdiction of the Provincial Legislature, and in that sense this enactment is *intra vires* the Provincial Legislature.

Judgment of the Chancery Divisional Court, 20 O. R. 222; 10 Occ. N. 336, affirmed.

Robinson, Q.C., and *Lefroy*, for the appellant.

Edward Blake, Q.C., and *Irving*, Q.C., for the respondent.

WATEROUS ENGINE COMPANY v. TOWN OF PALMERSTON.

Municipal corporations—Executory contract for purchase of fire-engine—Necessity for by-law—Contract under seal—R. S. O. c. 184, ss. 282, 480

Section 282 of the Municipal Act, R. S. O. c. 184, enacts that the powers of municipal councils shall be exercised by by-law when not otherwise authorized or provided for. Section 480 of the Act authorizes the council to purchase fire apparatus, etc., but says nothing about passing a by-law for the purpose.

The plaintiffs here sued upon an alleged contract for the sale by them to the defendants, the corporation of the town of Palmerston, of a fire engine and hose. The alleged contract was signed by the mayor of the town and by the clerk of the council, and the seal of the corporation was attached. No by-law was, however, passed authorizing the purchase. The engine was sent by the plaintiffs to Palmerston, but was not accepted by the defendants.

Held, that the want of a by-law was fatal, and the instrument under the seal of the corporation invalid.

Judgment of the Chancery Divisional Court, 20 O. R. 411; 11 Occ. N. 72, affirmed.

Wilkes, Q.C., for the appellants.

A. M. Clark, for the respondents.

BOYD, C.]

TENNANT v. UNION BANK.

Warehouse receipts—Bank Act—Promise to transfer warehouse receipts—Goods in transit.

Christie, Kerr, & Co. entered into an agreement with Peter Christie whereby the latter agreed to make advances to the firm for the purpose of enabling them to get out logs from the woods, the firm agreeing that Peter Christie should have security upon the logs and the lumber to be manufactured therefrom. Peter Christie borrowed the money from the Federal Bank, assigned the agreement to the bank, and advanced the money to the firm as agreed. The defendants subsequently arranged with Christie,

Kerr, & Co. and Peter Christie to advance the money to pay off the Federal Bank; the firm and Peter Christie on their part giving to the defendants as security a document in the form of a warehouse receipt on the logs, which were then in course of transit to the mill, and further promising to give warehouse receipts on the lumber when manufactured from the logs. Warehouse receipts were given to the defendants upon the manufactured lumber stored in the firm's yard. The firm became insolvent, the defendants seized the lumber, and this action was brought by the firm's assignee for the benefit of creditors for the alleged wrongful seizure and conversion.

Held, BURTON, J.A., dissenting, that the promise made to the bank supported the subsequent transfer to them of the warehouse receipts for the manufactured lumber, under s. 53, s-s. 4, of the Bank Act, R. S. C. c. 120, and they were consequently valid.

The document given to the defendants at the time of the arrangement with them was not a valid warehouse receipt within the meaning of the Act, as the logs were then in transit.

Judgment of BOYD, C., of the 4th June, 1890, affirmed.

McCarthy, Q.C., for the appellant.

Robinson, Q.C., for the respondents.

MACMAHON, J.]

WARD v. TOWNSHIP OF CALEDON.

ALGIE v. TOWNSHIP OF CALEDON.

Waters and water-courses—License to flood highway—Liability of licensor for negligence of licensee—Damage by breaking of mill dam—Rights and liabilities of riparian proprietors for damage.

A mill owner, having a license from the township to construct his mill dam in such a way as to flood a part of the highway, constructed it so negligently that it gave way, causing damage to proprietors below.

Held, that the license to dam water back upon the highway was, except in so far as it might be a public nuisance affecting travellers on the road, a lawful thing; and, the damage being caused by the negligence of the mill owner, the township was not liable.

Judgment of MacMahon, J., at the trial, reversed.

Mowat, Q.C., A.-G., *Robinson*, Q.C., and *Langton*, Q.C., for the defendants.

Moss, Q.C., and *W. L. Walsh*, for the plaintiff Algie.

E. Meyers, for the plaintiff Ward.

J. Reeve, Q.C., for the McLellands, third parties.

[1st February, 1892.

PEER v. NORTH-WEST TRANSPORTATION CO.

Venue—Change of—Rule 653—Preponderance of convenience—Discretion—Leave to appeal.

The question of changing the venue is to a great extent a matter of discretion. The present Rule 653 has not made any substantial change in the practice; and an overwhelming preponderance of convenience in favour of a change is still necessary.

Shroder v. *Myers*, 34 W. R. 261; *Power* v. *Moore*, 5 Times L. R. 586; and *Bridcut* v. *Duncan*, 7 Times L. R. 515, referred to.

But where the venue had been changed by an order of the Master in Chambers, affirmed by a Judge in Chambers and a Divisional Court, the Court of Appeal, though not satisfied that there was an overwhelming preponderance of convenience in favour of a change, refused to interfere with the discretion exercised, by granting leave to appeal.

George Bell, for the plaintiffs.

Douglas Armour, for the defendants.

IN CHAMBERS.

[OSLER, J.A., 28TH JANUARY, 1892.

ROBINSON v. HARRIS.

Appeal bond—Appeal to the Supreme Court of Canada—Parties to bond—Appellant a party—Non-execution by appellant—Condition of bond—Costs awarded by judgment appealed from.

In an appeal to the Supreme Court of Canada it is not necessary that the appellant should be a party to the appeal bond; but if the appellant is made a party and does not execute the bond, the respondent is entitled to have it disallowed; for it is unreasonable to ask the respondent to accept a bond to which the sureties may hereafter attempt, whether successfully or not, to raise the defence that they only executed it upon the faith that the appellant would be one of the obligees.

In an appeal bond, where the object was not only to secure payment of the costs which might be awarded by the Supreme Court of Canada under s. 46 of R. S. C. c. 135, but also under s. 47 *(e)*, to procure a stay of execution of the judgment appealed from as to the costs thereby awarded against the appellant, the condition was, "shall effectually prosecute the said appeal and pay such costs and damages as may be awarded against the appellant by the Supreme Court of Canada, and shall pay the amount *by the said mentioned judgment* directed to be paid, either as a debt or for damages or costs," etc.

Held, that this did not cover the costs awarded against the appellant by the judgment appealed from.

Woodworth, for the appellant.

F. E. Hodgins, for the respondent.

[MACLENNAN, J.A., 16TH FEBRUARY, 1892.

DRAPER v. RADENHURST.

Appeal to Supreme Court of Canada—Notice of appeal—R. S. C. c. 135, s. 41—"Special case," meaning of.

The judgment upon a special case intended in s. 41 of the Supreme and Exchequer Courts Act, R. S. C. c. 135, is a judgment on the kind of case well known by that name, and it

has no reference to the case which, by the practice of the Court of Appeal for Ontario, is prepared for the purpose of the appeal.

An objection to a bond on appeal from the Court of Appeal to the Supreme Court, that a notice of appeal was not given within twenty days, pursuant to s. 41, upon the ground that every appeal from the Court of Appeal is "upon a special case," was therefore overruled.

W. H. Blake, for the appellants.

Masten, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE JUSTICES IN BANC, 1ST FEBRUARY, 1892.

REGINA v. COSBY.

Survey—R. S. O. 1877 c. 146 —ss. 34, 35, 36, 37—Road allowance between counties—Survey not conclusive—Admissibility of evidence.

The defendant was tried upon an indictment for obstructing a highway, being the town line or allowance for road between two counties. It was shown at the trial that the road allowance, at the request of the municipal councils of the two counties and under the instructions of the Commissioner of Crown Lands, was laid out by a surveyor in the years 1883 and 1884. During the trial the defendant offered evidence to prove that the work done by the surveyor was erroneous and wrong. The Chairman of the General Sessions ruled that the evidence was inadmissible and the survey conclusive.

Upon a Crown case reserved:—

Held, that the case was governed by the provisions of ss. 34, 35, 36, and 37 of R. S. O. 1877 c. 146; that monuments to be placed in compliance with these provisions must be placed at the true corners, governing points, or off-sets, or at the true ends of the concession lines; and it is only when so placed that lines

drawn from them in the manner prescribed by the Act "shall be taken and considered to be the permanent boundary lines of such townships and concessions respectively;" and there is nothing in these provisions making the monuments referred to therein conclusive, whether rightly or wrongly placed, and nothing to prevent its being shown that they have been wrongly placed; and, therefore, the evidence offered was admissible and the survey not conclusive.

Tanner v. *Bissell*, 21 U. C. R. 558; *Regina* v. *McGregor*, 19 C. P. 69; *Re Fairbairn and Sandwich East*, 32 U. C. R. 575; and *Boley* v. *McLean*, 41 U. C. R. 260, distinguished.

F. D. Armour, Q.C., and *Aylesworth*, Q.C., for the Crown.

W. M. German, for the defendant.

[THE DIVISIONAL COURT, 1ST FEBRUARY, 1892.

STRATFORD GAS CO. v. GORDON.

Pleading—Rule 423—"Embarrassing," meaning of—Allegations of facts shewing probability of truth of pleadings—Evidence—Duty of trial Judge—Summary application to strike out pleadings—Unnecessary allegations—Verbosity—Discretion.

The plaintiffs were a gas company, doing business in a city and distributing gas by their mains throughout the city; the defendant was also the owner of gas works in the same city, from which he supplied certain buildings in the city. The statement of claim charged that the defendant laid or caused to be laid a pipe to communicate with the pipe belonging to the plaintiffs, or in some way obtained or used the plaintiffs' gas without the consent of the plaintiffs; and claimed the penalty given by s. 8 of the Gas and Water Companies Act, R. S. O. c. 164, and also the value of the gas alleged to have been taken.

The defendant, in thirteen paragraphs of his statement of defence, set out at great length various facts and circumstances, the gist of which was that the pipe mentioned in the statement of claim was so laid or caused to be laid by the plaintiffs, or by

some one on their behalf, and not by the defendant; and also made therein allegations of a malicious course of conduct towards the defendant affording reasons for the probability of the truth of the defence.

The thirteen paragraphs containing these allegations were moved against by the plaintiffs as embarrassing and irrelevant.

Held, that an embarrassing pleading under Rule 423 is one which brings forward a defence which the defendant is not entitled to make use of; but here the defendant was entitled to make use of the defence set up, and there was nothing in the paragraphs tending to prejudice or delay the fair trial of the action.

It might be that evidence of the course of conduct of the plaintiffs alleged by the defendant would not be permitted to be given; but that was a question for the trial Judge, and not one to be determined upon a motion to strike out pleadings except in a plain case. Even if it was unnecessary to plead this course of conduct, that did not make the pleading embarrassing.

The Court should not hesitate to interfere with the discretion exercised in Chambers, where the defendant has been thereby deprived of his right to set up a defence which he is entitled to make use of.

Remarks on verbosity in pleading.

Glass v. *Grant*, 12 P. R. 480, approved.

W. H. Blake, for the plaintiffs.

Idington, Q.C., for the defendant.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 23RD DECEMBER, 1891.

STEVENSON v. DAVIS.

Vendor and purchaser—Contract for sale of land—Possession given at once—Payment of interest until conveyance made—Delay in completion—Appropriation of money.

In a contract for the sale of land, where possession is taken at once and the contract stipulates for the payment of interest, the purchaser must pay interest from the date of the contract, unless there should be unreasonable delay in the completion, attribut-

able to the vendor, and there should be an appropriation of the purchase money and notice to the vendor.

In an action on a contract, where the vendor was to prepare the deed, and the purchaser got his purchase money ready to pay over and deposited it in a bank, at first to his own credit in his general account, but afterwards to the credit of a special account, of which he gave the vendor notice, and there was a delay of over two years in preparing the deed:—

Held, varying the judgment of ARMOUR, C.J., that the purchaser was bound to pay interest at the legal rate up to the time he deposited it to the credit of the special account, but that after that he was only bound to pay at such rate as he received from the bank.

Furlong and *George C. Thomson*, for the purchaser.

C. W. Colter, for the vendor.

[22ND JANUARY, 1892.

TRUST AND LOAN COMPANY OF CANADA v. STEVENSON.

Mortgagor and mortgagee — Payments of interest by a stranger after conveyance to a purchaser—Statute of Limitations—Title by possession.

The plaintiffs were mortgagees of certain lands in 1863. J. S. was a subsequent mortgagee, and became the owner in May 1869. He paid the interest as it became due to the plaintiffs, and in September, 1869, sold to a purchaser for value, through whom the defendant P. claimed title, covenanting that the land was free from incumbrances and that he had done no act to incumber. He went on paying the interest regularly to the plaintiffs up to the time of his death in 1884, and his executors paid interest up to 1890, when they ceased paying. The defendant P. had become the owner in 1888, deriving title from the grantee of J. S., and claimed title by possession without any notice of the plaintiffs' mortgages.

On a special case stated for the opinion of the Divisional Court:—

Held, that the payments made by J. S. after his conveyance in 1869 were made by him as a stranger and would not prevent the Statute of Limitations running in favour of the defendant P.; and that he had acquired title by possession.

Marsh, Q.C., for the plaintiffs.

Delamere, Q.C., for the defendant Perry.

G. F. Ruttan, for the defendants the executors.

FRONTENAC LOAN AND INVESTMENT SOCIETY v. HYSOP.

Mortgage—Covenant by purchaser to pay off—Right of mortgagee to bring action—Privity—Costs.

The defendant purchased part of certain lands which were mortgaged to the plaintiffs, and in his purchase deed covenanted with his vendor to pay $3,000 to the plaintiffs. In an action by the plaintiffs to recover that amount:—

Held, affirming the judgment of ARMOUR, C.J., that there was no privity between the purchaser and the mortgagees, and that the plaintiffs could not recover.

The plaintiffs' statement of claim alleged a covenant to pay the plaintiffs, and that the defendant had asked for and obtained from the plaintiffs time for payment.

Held, that it would not have been safe for the defendant to demur in the face of these averments; and the usual costs of an action were given.

Walkem, Q.C., for the plaintiffs.

H. V. Lyon, for the defendant.

HAYES v. ELMSLEY.

Vendor and purchaser—Proceedings to rescind contract—Wilful default—Interest on purchase money.

The taking of proceedings by a vendor to rescind an agreement for sale of land, successful at first, but ultimately reversed on appeal, is a wilful default, and the purchaser is not bound to pay interest on the purchase money for the period of time between the first judgment rescinding, and the decision in appeal restoring the contract.

W. R. Meredith, Q.C., and *Donovan*, for the plaintiff.

W. Cassels, Q.C., and *D. T. Symons*, for the defendant.

[27TH JANUARY, 1892.

BURNS v. DAVIDSON.

Fraudulent conveyance—Action to set aside—Lands in foreign country—Jurisdiction.

In an action by a judgment creditor to declare a conveyance made by a debtor, of property situate in a foreign country, fraudulent and void, where both the debtor and his grantee resided within the jurisdiction, the Court allowed a demurrer to the statement of claim.

Per BOYD, C.—A provincial Court is not justified in intermeddling with territorial rights acquired or subsisting in a foreign country. Here is no case of contract or obligation *inter partes;* no fraud of a personal character in regard to specific property claimed; no personal equity attaching to the defendants in respect of the lands which the Court could lay hold of; but only a right sought of having execution against alleged foreign assets held in fraud of creditors, which right *in rem* can only be effectually pursued in the *forum* of the site of the land. All questions as to the burdens and liabilities of real estate situate in a foreign country, in the absence of any trust or personal contract, depend simply upon the law of the country where the real estate exists.

Harrison v. *Harrison*, L. R. 8 Ch. 846, followed.

Gibbons, Q.C., for the plaintiff.

Purdom, for the defendants.

[BOYD, C., 8TH FEBRUARY, 1892.

WALLIS v. SKAIN.

Mechanics' lien—Form of claim—Omission of name and residence of person on whose credit work done—Demurrer—Costs.

The omission from the registered claim of lien of the name and residence of the person for whom or upon whose credit the work was done or materials furnished, required by s. 16 of the Mechanics' Lien Act, R. S. O. c. 126, is fatal to the lien; and the objection can be taken by the contractor as against a sub-contractor.

Where the objection was taken by the defendant contractor at the trial, costs were allowed him as of a successful demurrer, to be set off against the costs of a judgment for the plaintiff on the pleadings for an admitted debt.

McMichael, Q.C., and *J. A. Mills*, for the plaintiff.

G. G. Mills, for the defendant McNamara.

[17TH FEBRUARY, 1892.

ROBERTS v. DONOVAN.

Contempt of Court—Disobeying judgment—Non-performance of act necessitating the payment of money—Committal.

On a motion to commit the defendants for non-compliance with a judgment directing them to obtain a discharge of a certain mortgage:—

Held, following *Male* v. *Bouchier*, 1 Ch. Chamb. R. 359; 2 Ch. Chamb. R. 254, that if in effect and substance the essential thing to be done is the payment of money, whether by a party or a stranger, an order to commit would be a contravention of the statute C. S. U. C. c. 24, ss. 3 and 14, now R. S. O. c. 67, s. 6.

Hoyles, Q.C., for the plaintiff.

Donovan and *A. C. Macdonell*, for the defendants.

COMMON PLEAS DIVISION.

[THE JUSTICES IN BANC, 1ST FEBRUARY, 1892.

REGINA v. BITTLE.

Constitutional law—R. S. O. c. 61, s. 9—Intra vires—Criminal procedure—Offences against provincial enactments—Evidence of defendant.

Notwithstanding the reservation to the Dominion Parliament of the power to legislate with regard to criminal procedure, a Provincial Legislature has power to regulate and provide for the course of trial and adjucation of offences against its own lawful enactments, even though such offences may be termed crimes. The Ontario Legislature, therefore, has power to regulate the giving of evidence by defendants in such cases, and s. 9 of R. S. O. c. 61 is *intra vires*.

An offence against the Ontario Liquor License Act is a crime within the meaning of s. 9; and the defendant is neither a competent nor a compellable witness upon his trial for such an offence.

Du Vernet, for the defendant.

J. R. Cartwright, Q.C., for the Attorney-General for Ontario.

REGINA v. ROWE.

Constitutional law—R. S. O. 61, s. 9—Offence against Ontario Liquor License Act—Evidence of defendant.

On the trial of a person for an offence against the Ontario Liquor License Act, the giving of evidence is governed by Ontario legislation, and under s. 9 of R. S. O. c. 61 the defendant is neither a competent nor compellable witness.

The Dominion and Ontario legislation on the subject considered.

Du Vernet, for the defendant.

J. R. Cartwright, Q.C., for the Attorney-General for Ontario.

[9TH FEBRUARY, 1892

REGINA v. WESTGATE.

Summary conviction—52 V. c. 43 (D.)—No offence shown—Conviction quashed—Costs.

A summary conviction of the defendant under s. 1 of 52 V. c. 48 (D.) for supplying a cheese factory with milk from which the cream had been removed was, quashed for the reason that neither in the evidence nor in the conviction was it shown that any offence against the Act had been committed, it being nowhere said that the milk was supplied to be manufactured.

Costs were asked for against the prosecutor, but were not allowed.

The Court, in considering the question of costs, suggested that in future when a defendant is moving to quash a conviction he should, with the notice of motion for the *certiorari*, serve a notice stating that unless the prosecution should be abandoned and further proceedings rendered unnecessary, costs would be asked for against the prosecutor; if this were done, and the prosecution not abandoned, and the defendant were successful in quashing the conviction, there would be strong reasons for giving the costs against the prosecutor in a case in which it would not be just or fair that the defendant himself should pay the costs.

Aylesworth, Q.C., for the defendant.

D. W. Saunders, for the prosecutor.

REGINA v. YEMEN.

Gambling—Summary conviction for—No offence shewn—Conviction quashed—Costs.

A summary conviction for unlawfully gambling, contrary to a municipal by-law, was quashed for the reason that no offence was disclosed and also on grounds of irregularity.

No costs were awarded to the defendant, as the prosecutor—a constable—apparently acted in good faith in instituting and carrying on the prosecution.

M. G. Cameron, for the defendant.

REGINA v. WESTLAKE.

Intoxicating liquors—Ontario Liquor License Act—Summary conviction under—Selling without license—Evidence of—Costs.

The defendant purchased for $25 from a duly licensed hotel-keeper the day's receipts of the bar, and at the close of the day was paid over such receipts.

Held, that a summary conviction of the defendant for selling liquor without a license, contrary to the Ontario Liquor License Act, could not be supported; and it was accordingly quashed, but without costs.

Remarks on the question of costs in such cases.

Aylesworth, Q.C., for the defendant.

Langton, Q.C., for the prosecutor.

[THE DIVISIONAL COURT, 5TH DECEMBER, 1891.

GIBBONS v. TOMLINSON.

Husband and wife—Purchase of land—Effect of taking conveyance in name of wife—Creditors.

In December, 1885, W.T. purchased certain land, and paid the purchase money himself, but caused the conveyance to be taken in his wife's name. In 1888, at the request of W.T., his wife executed a declaration of trust in favour of G.T., and in 1890 she conveyed the land to him, in consideration of $1,200.

In an action by a creditor of the wife to have the conveyance set aside :—

Held, by FALCONBRIDGE, J., that on the evidence the conveyance to the wife must be treated either as a gift or as made for the purpose of protecting the property against the husband's creditors; and the conveyance to G. T. must be set aside.

Held, by the Divisional Court, that the evidence shewed rather that the conveyance was taken in the wife's name to please her; but whether so taken or as a protection against creditors, the conveyance by the wife was valid.

Lash, Q.C., for the plaintiff.

Fullerton, Q.C., for the defendants.

STARES v. MACKELCAN.

Solicitors—Action against, for negligence—Renewal of chattel mortgage—Duty of solicitors—Omissions from mortgage—Effect of.

The defendants, who were solicitors, under instructions from the plaintiff, took a chattel mortgage to her on E.'s goods, which was duly registered and forwarded to her at W., where she lived. The mortgage was made on 24th October, 1888, and on 21st October, 1889, the defendants posted a letter to her notifying her that the mortgage should be renewed, which in due course should have reached her on the 22nd, giving ample time to renew, but which she did not receive until the 1st November, after the time for renewal had expired.

Held, that no negligence on the defendants' part was shown.

Quære, per ROSE, J., whether any duty was imposed on the solicitors to give notice to the plaintiff of the necessity for renewal.

After the time for renewal had expired, the plaintiff consulted the defendants, and they drew up a new mortgage, which they advised her would not be valid against E.'s creditors; and it was subsequently abandoned on this ground. From this mortgage was omitted the "stock in trade," the most valuable portion of the security, while from the first mortgage was omitted a provision for the mortgage covering substituted goods.

Held, that these omissions did not, under the circumstances, affect the plaintiff's rights, and therefore constituted no ground for an action against the defendants.

Wallace Nesbitt, for the plaintiff.

MacKelcan, Q.C., for the defendants.

[1ST FEBRUARY, 1892.

BANK OF BRITISH NORTH AMERICA v. GIBSON.

Equitable assignment—Order for payment of money.

S., a contractor for the building of a church, being indebted to D. for materials furnished therefor, gave him the following order on the trustees, of which they were duly notified:—"Pay to the order of D. the sum of $306 out of certificate of money due to me on the 1st June, for materials furnished to above church."

Held, a good equitable assignment of money due on the 1st June.

Talbot Macbeth, for the plaintiffs.

Monteith, Q.C., for the defendant.

ROBERTSON v. LONSDALE.

Promissory note—Indorsement—Guaranty—Trust for payment of debts—Evidence.

L., being indebted to R., gave him his promissory note for $326.57, payable three months after date to R.'s order. Some years afterwards L. conveyed his farm to his son J. L. on an undertaking or verbal agreement between them that J. L. should pay L.'s debts, including this note. After the conveyance, on R. pressing L. for security, J. L. wrote his name on the back of the note, it not having been indorsed by R., the parties supposing that J. L. thereby rendered himself liable; and J. L. subsequently paid R. $50 on account. No notice of the arrangement between L. and J. L. was communicated to R., nor was any agreement made releasing L. from liability and substituting J. L. as debtor; and it appeared that R. had always considered L.'s liability as subsisting, and in this action sued him as maker and J. L. as indorser.

Held, that J. L. was in no way liable; it was admitted that he was not liable as an indorser; and he could not be treated as a guarantor nor as a trustee of the property conveyed and so liable to account to the plaintiff for the amount of the note.

Middleton, for the plaintiff.

IN CHAMBERS.

[BOYD, C., 14TH JANUARY, 1892.

In re CLARK.

Lunacy—Declaration of—Dispute as to property and custody of supposed lunatic.

Where a petition to have C. declared a lunatic was presented by one of his daughters, and it appeared that it was presented with a view to attack a disposition which C. had made of his

estate in favour of another daughter with whom he lived, for which purpose an action had already been begun in C.'s name by a son as next friend, and it also appeared to the Judge that there was no reason why C. should not remain in the custody and care of the daughter, the petition was dismissed, although C. was undoubtedly a lunatic.

Hoyles, Q.C., for the petitioner.

W. M. Douglas, contra.

[STREET, J., 4TH JANUARY, 1892.

In re ALLEN v. FAIRFAX CHEESE CO.

Prohibition—County Court—Jurisdiction—Partnership—Insurance moneys—Action to recover share.

An action was brought in a County Court by a partner against the partnership firm to recover his share of certain insurance moneys paid to the firm.

It was contended, upon a motion for prohibition, that as the County Court had no equity jurisdiction, it could not entertain the action.

Held, that the County Court had jurisdiction, as an action of the kind was cognizable at law, and the amount sought was within the jurisdiction; and prohibition was refused.

R. B. Beaumont, for the plaintiff.

Aylesworth, Q.C., for the defendants.

[MEREDITH, J., 21ST JANUARY, 1892.

ARNOLD v. PLAYTER.

Infants—Discovery—Examination—Rule 487.

In a proper case an infant party to an action may now be examined by the opposite party for discovery before the trial, under Rule 487, in the same way as an adult.

Mayor v. *Collins*, 24 Q. B. D. 361, distinguished.

Bristol, for the plaintiff.

Kilmer and *H. C. Boultbee*, for the defendants.

[Mr. Winchester, 25th January, 1892.

BEATY v. HACKETT.

Attachment of debts—Final order for payment by garnishee—Notice to judgment debtor—Assignment of debt attached—Rescission of final order.

Where a judgment creditor obtains an order attaching debts due to the judgment debtor, notice of the application for a final order for payment over by the garnishee should be served upon the judgment debtor.

Ferguson v. *Carman*, 25 U. C. R. 26, specially referred to.

A garnishee order binds only so much of the debt owing to the debtor from a third party as the debtor can honestly deal with at the time the garnishee order *nisi* is obtained and served.

Where a final order for payment over has been issued and it afterwards appears that the debt had been assigned before the attaching order was moved for, the final order should be rescinded.

Snow, for the judgment creditor.

F. W. Garvin, for the garnishee.

H. L. Drayton, for the claimants.

[18th February, 1892.

VIGEON v. NORTHCOTE.

Appearance—Notice of, where entered gratis.

Action to compel the specific performance of an agreement for the sale of land. The writ of summons was issued on the 5th September, 1891, and a certificate of *lis pendens* was then registered. The writ was not served on the defendant. On the 30th October, 1891, the defendant entered an appearance gratis, but did not notify the plaintiff thereof.

No statement of claim having been delivered, the defendant on the 12th February, 1892, moved before Mr. Winchester, sitting for the Master in Chambers, to dismiss the action for want of prosecution, or to vacate the *lis pendens*.

J. R. Roaf, for the defendant. No notice of appearance was necessary. Rule 281 provides that a defendant may appear at any time before judgment, and the only case in which notice of appearance is necessary is where the defendant appears after ten days from the service of the writ.

J. M. Clark, for the plaintiff. Notice of appearance is necessary where the appearance is entered gratis. It is not within the contemplation of Rule 281. *McLaggart* v. *Tooth*, 10 P. R. 261, shows that the practice as to appearing gratis is a continuation of the former practice, and is outside of the Rules. Although an appearance was not necessary under the practice of the Court of Chancery prior to the Judicature Act, notice of every proceeding by the defendant, under Chy. G. O. 46, had to be served on the plaintiff on the same day. See Braithwaite's Chy. Pr. p. 326; Crump & Evans' Jud. Pr. p. 86; Arch. Q. B. Pr., ed. of 1885, p. 286.

MR. WINCHESTER gave judgment on the following day, holding that notice of appearance was necessary; and dismissed the defendant's motion.

NEW BRUNSWICK.

In the Supreme Court.

[4TH FEBRUARY, 1892.

ATTORNEY-GENERAL FOR CANADA v. FOSTER.

Constitutional law—Customs Act—Powers of Dominion Parliament to impose taxation—53 V. c. 20—Ex post facto legislation—"Property and civil rights"—Right of Parliament to impose an additional tax after goods are taken out of warehouse.

This was an action to recover certain duties on whiskey. On the 16th May, 1890, the Parliament of Canada passed the Act 53 V. c. 20, imposing additional duties on whiskey, by which it was declared that the Act should be held to have come into force on the 28th March previous. The defendants had taken a quantity of whiskey out of warehouse between those dates and had paid all duties then demanded by the customs officers. After the passage of the Act, the customs officers demanded the additional

duties imposed on the goods so taken out, which the defendants refused to pay. A verdict was recovered by the plaintiff, which was now moved against by the defendants.

The questions raised were:—(1) Whether the Act, 58 V. c. 20, was beyond the powers of the Parliament of Canada. (2) Whether s. 19 of that Act was beyond the powers of the Parliament of Canada because, it affected "property and civil rights in the Province," upon which subject the exclusive right to legislate was expressly given to the Provincial Legislatures by s. 92 of the B. N. A. Act. (3) Whether s. 19 of 58 V. c. 20 was applicable in this case, where the duties were paid according to the Customs Act then in force, and the goods taken out of the warehouse nearly a month before the new Act received the Governor-General's assent.

Held, per ALLEN, C.J., KING, FRASER, and TUCK, JJ.; PALMER, J., dissenting; that the Courts of this country had no right to question the power of the Dominion Parliament to pass the present Act, even though they might consider the provisions of the 19th section unreasonable or unjust. It related to one of the subjects over which the Imperial Parliament had given the Dominion Parliament exclusive authority by the 91st section of the B. N. A. Act.

Held, also, that whatever construction might be given to the words "property and civil rights" in some cases, they could not apply in the present case, because full force and effect must be given to the 91st section, which vests the Dominion Parliament with the exclusive right to regulate trade and commerce, which, to use the language of RITCHIE, C.J., must involve full power over the matter to be regulated and exclude the interference of all other bodies that may attempt to meddle with the same matter.

Held, further, that it is impossible to give effect to s. 85 of R. S. C. c. 32, that goods taken out of warehouse shall be subject to the duties to which they would have been subject if then imported, and also at the same time to give effect to s. 19 of 58 V. c. 20, which imposes a higher duty on goods imported and taken out of warehouse after a certain day. When two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, the earlier one is repealed by implication.

W. A. Ewing, for the plaintiff.

G. G. Gilbert, Q.C., for the defendants.

DOHERTY v. McDEVITT.

Fence-viewers—C. S. N. B. c. 110—Right of action—Person employed—Double costs—C. S. N. B. c. 55—Verdict determines amount of plaintiff's demand.

A portion of the line fence between the properties of the defendant and M. was in dispute, and M. applied to the plaintiff, who was the nearest fence-viewer, to determine the portion of the fence which should be built by each party, under the provisions of C. S. N. B. c. 110, which the plaintiff did and gave the defendant due notice of his action. The defendant did not put up his portion, and at the request of M., the plaintiff built the defendant's portion, and, on his refusal to pay, brought an action in the Fredericton City Court for the expenses caused by the erection of the fence. The action was brought for $24 and a verdict recovered for $5. A review was taken to a Judge, who at the request of the parties referred the matter to this Court.

Held, that under C. S. N. B. c. 110, the fence-viewer had the right to determine the portion of fence which each party should erect.

Held, also, that the fence-viewer could only recover the fees allowed by the Act for his services in superintending the construction of the fence, and that the person employed by the fence-viewer to erect the fence was the only person who under the provisions of the Act could maintain an action for the labour and materials used in the fence.

The police magistrate before whom the case was tried taxed double costs to the plaintiff under C. S. N. B. c. 55, s. 5.

Held, that the amount of the verdict must be considered the amount of the plaintiff's demand, and that double costs were not taxable in the case, as the verdict did not exceed $20.

Verdict reduced to $3.50 with single costs.

Vanwart, Q.C., and *C. W. Beckwith*, for the plaintiff.

Blair, A.-G., for the defendant.

BABIN v. LEWIS.

Justice of the peace—City Court of Moncton—Justice's civil jurisdiction—Act and repealing Act passed on same day—Effect of.

By an Act of the legislature of New Brunswick, 53 V. c. 60, s. 67, a Court for the trial of civil actions in the city of Moncton was created, to be presided over by a commissioner and called "The City Court of Moncton." Section 78 of the Act declared that "No justice of the peace, etc., etc., shall exercise any civil jurisdiction within the city of Moncton in any matter over which the City Court has jurisdiction." This Act was passed on 23rd April, 1890, and on the same day another Act, c. 76, in amendment thereto, was passed by which the above s. 78 was repealed. The question in this case was whether a justice of the peace for the county of Westmoreland, in which Moncton is situate, had any jurisdiction to try a civil action in the city of Moncton.

Held, that s. 78 never in fact came into force, so that the civil jurisdiction of a justice of the peace in the city of Moncton had never been taken away; and consequently C. S. N. B. c. 120, s. 5, did not apply to this case.

In re QUEEN'S COUNTY DOMINION ELECTION. BAIRD v. KING.

Dominion Controverted Elections — Petitioner claiming seat — General Rules 8 and 9—List of objections—Practice—Agreement—Petitioner awarded seat.

The petition in this case was filed on 27th May, 1891, and complained of the undue election and return of the respondent; that the petitioner had the majority of legal votes at the election and should have been returned instead of the respondent; and that the petitioner should be declared the sitting member for the electoral district. On the 14th December, 1891, the petitioner filed a list of the voters which he objected to, with

grounds of objections in accordance with the 8th General Rule of the Election Court. The respondent filed no list of objections as required by Rule 9. At the trial an agreement was entered into by the parties by which the Election Court was asked to refer to this Court the questions of law stated in the following agreement:

1. The respondent admits bribery by agents.

2. It is admitted by all parties that the personal charges of bribery, etc., cannot be sustained.

3. The petitioner claims that he has the right to strike off votes from the respondent as illegal and void, which right the respondent denies.

4. If the petitioner's contention as to striking off votes is sustained, then the respondent claims that he has the right to strike off votes from the petitioner, which right the petitioner denies.

5. If both the said questions as to striking off votes as aforesaid are decided in favour of the petitioner, then it is admitted that 30 of the votes cast for the respondent are illegal and void on account of bribery by agents, and that the petitioner is entitled to have the seat.

6. Should the Court decide that the petitioner cannot go into a scrutiny to strike off votes, the petitioner abandons his claim to the seat; or, if the respondent is also entitled to strike off votes from the petitioner, the petitioner also abandons his claim to the seat, on account of bribery by agents.

Held, per ALLEN, C.J., PALMER, FRASER, and TUCK, JJ., that under General Rules 8 and 9 of the Election Court, the law was too clear to admit of any doubt, and that both the questions as to striking off votes must be decided in favour of the petitioner, and consequently on the facts submitted by the agreement of the parties the petitioner was entitled to have the seat.

Held, per KING, J., that the allegations in the petition were not sufficient to justify the claim to strike off votes for the respondent.

Held, per ALLEN, C.J., FRASER and TUCK, JJ., that no question as to the sufficiency of the petition had been referred to this Court for decision, nor had any such objection been taken on the agreement.

L. A. Currey, for the petitioner.

C. W. Weldon, Q.C., for the respondent.

[12TH FEBRUARY, 1892.

In re KING'S COUNTY DOMINION ELECTION.

BAXTER v. FOSTER.

Dominion Controverted Elections—Service of petition—Six months' limit—Order fixing day for trial does not enlarge the time—Costs.

The petition was filed on the 2nd May, 1891. On 29th October, 1891, the petitioner made application to a Judge assigned to try the petition, to fix the day for trial. Counsel for the respondent objected to a day being fixed for the trial, on the ground that no legal service of a copy of the petition had been made, the respondent having been served at Ottawa. The Judge thought the objection of sufficient importance to refer to this Court, but, at the request of the petitioner's counsel, fixed the 23rd February, 1892, as the day for the trial of the petition. The six months from the date of the presentation of the petition expired on the 2nd November, 1891. No order was made for enlarging the time for the commencement of the trial. A rule *nisi* to dismiss the petition on the latter ground having been obtained:—

Held, that personal service of a copy of the petition on the respondent at Ottawa was good service.

Held, also, that the failure of the petitioner to have the time enlarged for the commencement of the trial was fatal to the petition.

Emerson v. *Wood*, 26 N. B. Reps. 582, and *Kennedy* v. *Purcell*, 14 S. C. R. 528, followed.

C. W. Weldon, Q.C., for the petitioner.

Barker, Q.C., *E. McLeod*, Q.C., and *L. A. Currey*, for the respondent.

GALLAGHER v. COUNTY OF WESTMORELAND.

Municipal corporations—Wrongful dismissal of officer of corporation—Legal malice—Actual malice—Want of reasonable and probable cause—Misdirection—Damages—Punitive damages—Costs—Excessive damages.

This was an action for damages for the malicious dismissal of the plaintiff, by the council of the defendants, from the office of county valuator, and for maliciously preventing him from discharging his duties as such valuator. The jury found a verdict for the plaintiff for $1,120.30, of which $863.30 was for damages for the costs of proceedings in getting rid of the order dismissing the plaintiff from office, $300 represented the amount which the plaintiff would have earned had he been allowed to act, and $457 was awarded as punitive damages.

Held, on the evidence, that there was very clearly a determination on the part of the council to act wrongfully to the detriment of the plaintiff; that they were actuated throughout the whole proceeding by what amounted to legal malice towards the plaintiff; and when it was considered that the defendants did not attempt to rebut any inference of malice or shew that there was any reasonable or probable cause for what they did, the conclusion was irresistible that the order for the dismissal of the plaintiff was maliciously made, and the subsequent acts by which he was prevented from discharging the duties of his office were also done from malicious motives; for all of which the defendants were liable.

Held, also, that it was misdirection to tell the jury that malice in fact was not necessary to sustain the action for malicious dismissal; but that malice to sustain the action might be inferred from a want of reasonable and probable cause.

Held, also, that the damages should be reduced by deducting from the $863.30 the sum of $45, the costs of *quo warranto* proceedings taken by the plaintiff against E. K., whom the council had appointed valuator in his stead; for these costs, if recoverable, could only be so when awarded in the *quo warranto* proceeding and against the person who was ordered to pay them.

Held, also, that the $457 allowed as punitive damages was not unreasonable or excessive.

D. L. Hanington, Q.C., *W. W. Wells*, Q.C., and *C. A. Palmer*, Q.C., for the plaintiff.

Blair, A.-G., for the defendants.

In re GLOUCESTER DOMINION ELECTION.

LANDRY v. BURNS.

Dominion Controverted Elections—Words omitted in copy of petition served—When fatal—Service—Preliminary objection.

In the copy of the petition served on the respondent the words "return and election of the said Kennedy F. Burns was and is wholly null and void," were omitted at the end of the sixth paragraph of the petition. It was contended for the respondent that this was not a copy within the meaning of the 10th section of the Dominion Controverted Elections Act; and secondly, that if no copy had been served within the time limited by the Act, and the same had not been extended, the Court had no jurisdiction to proceed in the case and the proceedings against the respondent were at an end, and the Election Court could not further proceed in the matter and this Court should order all further proceedings to be stayed.

These questions were referred to the full Court by the Election Court.

Held, per ALLEN, C.J., PALMER and TUCK, JJ., following *Rogers v. Wallace*, 24 N. B. Reps. 468, that the second point should be decided in favour of the respondent.

Held, as to the first point, that the decision which the Election Court is to come to on the question upon which they have asked the decision of this Court, depends upon how they decide the the fact in contest between the parties. If they decide under the testimony to be heard by them that the respondent has only been served with a paper in which the words referred to were omitted, then they have no power further to proceed in the matter. But if, on the other hand, they find the petitioner has served a copy or a paper containing the words of the petition, the onus of proving which is upon the petitioner, then the Election Court ought to proceed to hear the matter, as everything else directed by the statute had been done to give them jurisdiction.

Held, per KING and FRASER, JJ., that the omission of the words referred to in the copy served was not material, inasmuch as they were only the legal conclusion from the facts stated, and might therefore be treated as surplusage.

Referred back to the Election Court to try out the question of fact.

George F. Gregory, Q.C., for the petitioner.

L. A. Currey, for the respondent.

RICHARDS v. BOWES.

Pleading—Bill of exchange—Action on—Declaration—Necessary averments—Bill held by a bank as agents.

This was an action on a bill of exchange. The declaration set forth that the plaintiffs drew their bill of exchange upon the defendant, requesting him to pay to the order of the Bank of Montreal ten days after sight $150.27, which bill of exchange, it was averred, the defendant accepted on the 19th January, 1891, and which bill was duly presented for payment at maturity and was dishonoured, and that the defendant had paid $10 on account of the said bill, "and the amount of $140.27 of said bill is still due and unpaid, and the said bill of exchange is still held by the plaintiffs." The defendant demurred to this declaration and contended that there was not a sufficient averment of facts to shew a title in the plaintiffs to the bill of exchange declared on; that there should have been an averment that the Bank of Montreal had after dishonour of the bill returned it to the plaintiffs by indorsement or otherwise.

Held, that the declaration did not allege that the bill had been transferred to the bank so as to show that the property in the bill passed to the bank. The bank was merely the agent of the plaintiffs to procure the acceptance and to demand and receive payment of the money, and the statement "and said bill of exchange is still held by the plaintiffs" legally imports that they had always from the making of the bill been the holders of it, and being the holders were entitled upon its non-payment to sue the acceptor.

Held, also, that the defendant by his demurrer admitted that the bill of exchange was held by the plaintiffs, and that impliedly admitted the re-delivery of the bill to them, if it were necessary to aver a return of the bill.

Judgment for the plaintiffs on the demurrer.

C. W. Weldon, Q.C., for the plaintiffs.

L. A. Currey, for the defendant.

Ex parte LIPPETT.

Canada Temperance Act—Order in council bringing Act into force need not specify a particular day.

This was an application for a rule *nisi* for a *certiorari* to remove a conviction for violation of the Canada Temperance Act, in the county of St. John, made by a Parish Court commissioner. Several objections were made to the conviction, but the only one reserved for judgment was that the order in council published in the *Canada Gazette* declaring the Act to be in force in the county was not a good order under the Act, as it should have named a particular day for the coming into force of the Act.

Held, that the order in council was perfectly good as it was, and that there was no uncertainty whatever as to the time at which the Act was to come into force. The day and year of the Act coming into force was not stated in the order, but, applying to the order in council the maxim, "*Id certum est, quod certum reddi potest*," and the admitted fact at the trial that the annual or semi-annual licenses in the county of St. John, which were in force on 1st July, 1881, (the date of publication of the order) expired in June, 1887, it sufficiently appeared that the Act came into force in June, 1887, more than four years and a half before the laying of the information in this case.

Rule refused.

C. N. Skinner, Q.C., for the applicant.

Ex parte WHALEN.

Canada Temperance Act—Conviction—Discretion of magistrate — Costs—51 V. c. 34, Form T.

The objection in this case was that the conviction was defective in that the magistate should have followed the form of conviction prescribed by the Act 51 V. c. 34, in amendment to the Canada Temperance Act, and not the form prescribed by the Summary Convictions Act, R. S. C. c. 178.

Per ALLEN, C.J.—Apart from any objection to the use of the Form T. in 51 V. c. 34, s. 14 of that Act is not imperative on the magistrate to use that form on a conviction for a first offence under the second part of the Canada Temperance Act, unless he has in the exercise of his discretion, as given by s. 66 of the Summary Convictions Act, adjudged that the defendant should pay the costs of commitment and conveyance to prison. Section 14 does not profess to repeal the forms prescribed by the Summary Convictions Act, which are made applicable to prosecutions under the Canada Temperance Act, and to substitute other forms; and therefore the necessity of Form T. is not apparent, because the form of conviction in the Summary Convictions Act provides for cases where the magistrate adjudges the payment of costs of conviction and conveying the defendant to prison as well as to cases where he does not so adjudge.

Rule *nisi* for *certiorari* discharged.

A. I. Trueman, for the applicant.

A. S. White, contra.

MANITOBA.

In the Queen's Bench.

[THE FULL COURT, 13TH FEBRUARY, 1892.

MARTIN v. MANITOBA FREE PRESS CO.

Libel—Action against publishers of newspaper—Innuendo—Defence of fair comment—Charge of Judge misunderstood or disregarded by jury—New trial.

Action for libel. The declaration alleged that the defendant company falsely and maliciously printed and published of the plaintiff certain defamatory matter, meaning, as the *innuendo* alleged, that, at the instance of the plaintiff, who was then Her Majesty's Attorney-General for the Province of Manitoba, provision was made in the contract between the Provincial

Government and the N. P. & M. R. Co. for raising a large sum of money by the company, "a portion of which was to be dishonestly and corruptly received by the plaintiff, for his own use and benefit, to the great detriment of the Province." To this declaration the defendants pleaded the general issue and a plea setting up that the words complained of, and the whole of the article of which they formed a part, were fair comment on matters of public interest, and were published *bona fide* for the public benefit.

The case was tried before KILLAM, J., and a special jury, when a verdict was entered for the defendants.

When the jury returned into Court and the foreman announced that they had found a verdict for the defendants, the Judge, before the verdict was recorded, asked them if they had anything to say as to any of the questions he had submitted to them, and added, "Do you find whether the publication had the meaning ascribed to it by the plaintiff?" The foreman replied, "We did not consider that at all; we found that the article complained of was fair comment on a matter of public interest, but the jury, while giving their verdict, desire to state that it would have been better if more temperate language had been used."

The learned Judge then said, "If it imputed a specific act of misconduct to him (the plaintiff) it could not be fair comment. You understand that, do you?"

To this the reply of the foreman was, "I think we understood your lordship's directions thoroughly."

The plaintiff then moved to set aside the verdict and for a new trial on the ground, amongst others, that the jury did not consider the question as to whether the words complained of bore the meaning alleged in the *innuendo*.

Held, DUBUC, J., dissenting, that there should be a new trial, on the ground that the jury misunderstood or disregarded the charge of the Judge, and did not consider the question it was essential for them to consider and pass judgment upon before they could find a verdict for the defendants.

Per TAYLOR, C.J.—If a defendant charged with libel shows the communication to be a privileged one, he can stop there, and need not go on to prove his belief in the truth of what was said. In such a case malice must be proved to entitle the plaintiff to a

verdict. But where the defence is fair comment, then what is commented on must be facts admitted or proved to be true.

While in a case of privileged communication the truth of the fact asserted is not important, in the case of fair comment the truth or falsity is important. Under a plea of fair comment, the truth of what is commented on may be proved.

Per BAIN, J.—If a writer brings an unfounded charge of dishonesty or specific misconduct against a public man in connection with a matter of public interest, such charges are libellous, no matter how sincere and honest may be the belief of the writer that they are true; a defendant cannot rely on a plea of fair comment as an excuse for such a charge, as it is not comment at all to allege specific misconduct. And it is clear that it is not competent to a defendant relying only on such a plea, and without a plea of justification, to adduce evidence to shew that the charges of specific misconduct or dishonesty he had made were true; a defendant, relying on this plea, may always prove, if he can, that the matters or facts on which he commented are true, that is, that they are or were actual facts or occurrences, and not merely imaginings or inventions.

Howell, Q.C., and *C. P. Wilson*, for the plaintiff.

Hagel, Q.C., and *Culver*, Q.C., for the defendants.

ROE v. MASSEY MANUFACTURING CO.

Chattel mortgage—Contest between chattel mortgagee and execution creditor—Preference—Intent—Demand for security—Interpleader.

Interpleader issue. The plaintiff claimed the goods in question under two chattel mortgages, dated 24th December, 1889, and 11th April, 1890, respectively, made to him by Malcolm and Duncan McKellar, and the defendants claimed under writs of execution against each of the McKellars individually.

The first mortgage was on a pair of horses which the McKellars had bought from the plaintiff, and the mortgage was given to secure the payment of what they owed him for the horses and some other small amounts. The other mortgage was for $900. This amount was made up of the $600 and unpaid interest on

the first mortgage for $166 lent the McKellars by the plaintiff when the mortgage was given, and of several other small amounts which they then owed him.

The defendants contended that both these mortgages were fraudulent and void as against them.

The trial Judge entered a verdict for the plaintiff, holding that the first mortgage was good; with regard to the second, he found that at the time it was given each of the two mortgagors was separately insolvent and unable to pay his debts in full, and that the mortgage was given with intent on the part of the mortgagors to give the plaintiff a preference over the defendants. The Judge was not satisfied that the plaintiff shared in this intent of the mortgagors to prefer him; and, as the claims of the defendants were against the McKellars individually, he doubted if it could be said that the mortgage had the effect of giving the plaintiff a preference over the defendants as creditors of the individual mortgagors.

Held, on appeal, that as the mortgage was given for a valuable consideration and in response to a *bona fide* demand or request from the plaintiff, the fraudulent intent was rebutted, and although the result was that the plaintiff obtained a preference, still the mortgage was not void under the Manitoba Act respecting assignments for the benefit of creditors, 49 V. c. 45, s. 2, nor was it void under the statute of Elizabeth.

Application to set aside the verdict dismissed with costs.

J. Martin, for the plaintiff.

Culver, Q.C., and *W. J. Cooper*, for the defendants.

THOMPSON v. SEGUIN.

Evidence — Foreign commission — Application to suppress — Irregularity — Waiver.

This was an application to reverse an order made by TAYLOR, C.J., on appeal from an order of the Referee in Chambers, and directing the suppression of a commission to take evidence at St. Paul, Minnesota, and the depositions taken under it, thus reversing the order of the Referee, who had dismissed the application.

Objections were taken:—

1. That this was an interpleader issue, in which, as it was claimed, no commission evidence could be taken or used.

2. That the order for the commission was silent as to the mode of examination, while the commission itself directed an examination upon *viva voce* questions, and the examination was held as directed by the commission.

Held, that the first point did not appear to be one which should be raised upon an application of this kind. The time to object to the issuing of the commission is when the order is applied for. The objection ought to be considered wholly as an objection to the receipt of such evidence and one that can be raised only at the trial.

2. That the conduct of the defendant's attorney at the time of the taking of the examination under the commission constituted a waiver of the irregularity, for he virtually agreed that the examination should be a *viva voce* one, and apart from any question as to the terms of the order, he was estopped from taking the objection.

Application granted, and order of the Referee restored.

Culver, Q.C., and *Elliott*, for the plaintiff.

C. P. Wilson, for the defendant.

[TAYLOR, C.J., 16TH FEBRUARY, 1892.

McKAY v. RUMBLE.

Appeal—From County Court—54 V. c. 2, s. 21—Construction of—Setting aside judgment—Meritorious defence—Ex parte order.

Appeal from a County Court. The plaintiff began an action in the County Court, and in due course judgment by default was signed against the defendant. Some days after, an attorney went before the County Court Judge with an affidavit showing that he had received a dispute note from the defendant's attorney, but through an oversight on his part he had failed to file the same. Thereupon the County Court Judge made an

ex parte order setting aside the judgment on the payment of the costs of signing same, and also ordered that the dispute note be received and filed. Against this order the plaintiff appealed.

By the Manitoba County Courts Act, 54 V. c. 2, s. 21, there may be an appeal by "any person directly affected by any order, decision, or judgment of a Judge, or verdict of a jury."

Held, that the language used in the statute was wide enough to include any order made by a Judge, final or interlocutory, upon the merits in an action, or upon a mere point of practice; and therefore the appeal lay.

The judgment should not have been set aside *ex parte*, nor without an affidavit of merits.

Appeal allowed and order appealed against set aside.

The præcipe for setting down the appeal did not ask that the order might be set aside with costs, and, as no one appeared for the defendant, the order was made without costs.

Ewart, Q.C., for the plaintiff.

[BAIN, J., 18TH FEBRUARY, 1892.

HARRIS v. YORK.

Interpleader—Delay in applying for order—Negligence of sheriff.

Appeal against an interpleader order made by the Referee in Chambers. The sheriff's bailiff seized on 1st December, 1891, twenty stacks of wheat and three stacks of oats. A notice claiming the grain was served on the bailiff by the claimants within a day or two after he made the seizure, and the sheriff stated he received this notice on or about 8th December. After the notice of claim had been served on the bailiff, he had the stacks threshed and sold a portion of the grain for $201.60. This money and the balance of the grain was in the sheriff's possession; he did not apply for an interpleader order until 23rd December, the reason he gave for the delay being that he had difficulty in getting definite information from his bailiff and from the place where the seizure was made.

The claimants alleged that the sheriff exceeded his duty in threshing the grain, and that he was guilty of negligence in threshing when and in t he manner he did. After the grain had been stacked there was a heavy snow-storm which drove into the stacks, and the claimants alleged that by threshing the stacks with the snow and ice in them the grain was practically destroyed. The stacks should have been left until the spring to dry.

Held, that the sheriff was not entitled to an interpleader order; instead of applying promptly to the Court as soon as he had notice of the adverse claim and asking the Court to decide between the parties, he chose to exercise his own discretion, and, ignoring the notice of claim, proceeded to thresh and sell part of the grain he had seized as if he were satisfied that it really was the property of the defendant.

Appeal allowed and order of the Referee set aside with costs

Sutherland, for the plaintiffs.

Davis, for the claimants.

Cumberland, for subsequent execution creditors.

Howell, Q.C., for the sheriff.

BRITISH LINEN CO. v. McEWEN.

Pleading—Application to strike out plea—Delay—Waiver.

Appeal from an order of the Referee in Chambers striking out the defendant's fourth plea as embarrassing.

The defendant's pleas were filed on the 4th May, 1889, and on the 29th January, 1890, the plaintiffs filed a demurrer to this fourth plea. In the meantime the plaintiffs had applied for and obtained several orders extending the time for demurring or replying to the plea, and they also took out an order for the examination of the defendant on this plea. Subsequently judgment was given for the defendant on the demurrer. After the demurrer was thus disposed of, the plaintiffs obtained another order to examine the defendant on this plea and then took out a summons to strike out the plea as embarrassing.

The Referee made the summons absolute, and the defendant appealed from his order.

Held, that, under the circumstances, the application of the plaintiffs should not have been entertained. By the delay and by the steps they had taken since the plea was filed, they must be held to have waived any objections there might be to the form of of the plea.

Appeal allowed with costs.

Tupper, Q.C., and *Phippen*, for the plaintiffs.

Bradshaw, for the defendant.

NORTHWEST TERRITORIES.

In the Supreme Court.

[McGuire, J., 10th February, 1892.

In re BENTLEY AND MORRIS.

Registry laws — Territories Real Property Act, R. S. C. c. 51 — Mortgage entitled to registration though certificate of ownership not produced therewith to registrar—Priorities—Memorials.

B.'s mortgage, unaccompanied by a certificate of ownership, was "received and filed" and entered in the day book by the registrar on the 7th October, 1889, but no memorial was then entered in the register.

M.'s mortgage, accompanied by a certificate, was received and registered on the 14th October, 1889. In March, 1890, B. produced his certificate to the registrar, who then completed the registration of B.'s mortgage by entering a memorial in the register and on the certificate, but under those of M.'s mortgage. The memorial of M.'s mortgage was defective in not showing the date of registration.

Held, that B.'s mortgage, being filed and entered in the day book prior to M.'s mortgage, was entitled to priority of registration, by s. 39 of the Territories Real Property Act, R. S. C. c. 51.

That the memorials showed the facts from which priority could be inferred, and the order in which they appeared in the register was immaterial. That the memorial of M.'s mortgage should be amended without charge.

Muir and *West*, for Bentley.

J. P. Jephson, for Morris.

The facts and arguments of counsel are set out by the learned Judge with his rulings, as follows :

McGuire, J.—In this matter a summons was taken out before me on behalf of one Henry Bentley, calling upon the registrar at Calgary and one S. B. Morris to show cause why an order should not be made directing the registrar to correct and amend certificate of ownership No. 121, as hereinafter set forth.

The facts are that one Gay owned a lot and had a certificate of title under the Territories Real Property Act.

He gave a mortgage thereon to said Bentley on 19th July, 1889, and a subsequent mortgage to said Morris on 27th September, 1889. On 7th October, 1889, Bentley's advocate brought his mortgage to the registry office to have it registered, and Mr. Barker, who was then acting registrar at Calgary, filed the mortgage, entered it in the day book, and indorsed on the duplicate mortgage returned to Bentley a certificate of its being received and filed at 11.10 a.m. on the 7th October, 1889, number 1311, D. Book B. fol. 232. But because Bentley had not produced the duplicate certificate of title issued to the owner, the acting registrar thought he could not then complete the registration, and he accordingly did not enter a memorial thereof in the register or in fact do anything further in the matter. On the 14th October, 1889, Morris' advocate brought in his mortgage. He made a search in the register but found only one mortgage mentioned there, namely, to one Primrose, which he paid off and had released, and then gave in his mortgage for registration. He had the owner's certificate of title with him, and the registrar proceeded to register the mortgage, and entered a memorial accordingly in the register and on certificate of title produced, referring to "D. B. B. No. 1353, folio 236," but not mentioning the day, hour, or minute of registration. Nothing further was done till March, 1890, when the certificate of title being produced to the registrar, he indorsed thereon a memorial of the Bentley mortgage, which memorial states that said mortgage was "registered 11.10 a. m. 7th October, A.D. 1889, No. 1311, D. B. B. 232"—evidently taking the time, etc., from the entry in the day book.

This memorial is written under that of the Morris mortgage, both in the register and on the certificate of title, and so might appear to be subsequent thereto, but the contents of the two memorials show that the Bentley mortgage is thereby given priority, its number being 1311 and its day book page 232, the

Morris mortgage being numbered 1358, and entered in day book on page 236. Bentley, however, fearing that the memorial of the Morris mortgage being so entered, it would thereby be given priority, asks by this summons that the former memorial should be ordered to be cancelled and a new memorial thereof, as of the 14th day of October, 1889, and after the memorial of the Bentley mortgage, entered on the certificate of title, or for such further or other order as might be deemed meet.

The memorial of the Morris mortgage is unquestionably defective in not "stating the · · · day, hour, and minute of the presentation of it for registration" as required by s. 42. It ought therefore to be amended accordingly both in the register and on the certificate. It does not seem to me to be material in what order the memorials appear, provided their contents show the facts from which priority is to be inferred. If the Bentley mortgage is entitled to priority, then I think the certificate of title and register each shows those facts; at any rate they will distinctly do so when the proper amendment is made.

But the question still remains, which of these two mortgages is entitled to priority of registration? There seems to be a belief prevalent that no mortgage or transfer can be registered after the issue of a certificate of title unless and until that certificate is produced for the purpose of having a memorial indorsed thereon. That belief seems based on the supposed meaning of s. 62, that the owner's certificate of title is at all times evidence to all the world of the state of the owner's title and that a person proposing to deal as to land may accept the certificate as showing all mortgages, etc., legally affecting the title.

It might be well if such were the law, as in that case there would be no need to search in the registry office; to bring this about, however, many changes in the Act would be necessary.

A perusal of the certificate itself shows that this effect attributed to it is not possessed by it. It "certifies that A. B. is now the owner, etc., subject to the incumbrances, liens, and interests notified by memorial underwritten or indorsed hereon, or *which may hereafter be recorded* in the *register of title*." It thus expressly gives notice that there may be incumbrances, etc., other than those so underwritten or endorsed. Section 60 confirms this. It says the owner "shall hold subject (in addition to the incidents implied by virtue of this Act) to such incumbrances

. . . as are notified on the folio of the register, etc." Note that it says "on the folio of the register," not the owner's certificate. It is necessary therefore to examine the register in searching a title, and if a mortgage appears there, though not notified on the certificate, the title is subject thereto. The danger apprehended that to register a mortgage without having the certificate on which to enter a memorial, would be to allow a misleading certificate, to be at large is not, therefore, real. It was also urged that "registration" includes the recording of a memorial on the owner's certificate, and that until the registrar is enabled to enter such memorial thereon he cannot complete the registration, and that it is consequently the duty of a person applying to have a mortgage registered to produce the certificate. I do not agree with this proposition. By s. 43, it is undoubtedly the registrar's duty (except where the mortgage is indorsed on the certificate) to record thereon a memorial similar to that entered in the register, but after it has been first "entered in the register." S. 40 declares what registration is.—"Every transfer, etc., shall be deemed and taken to be registered as soon as a memorial thereof as hereinafter (s. 42) described, has been entered in the register, etc." This is so plain that it leaves no doubt that registration is complete the moment the proper memorial has been entered in the *register*. Whatever the registrar is required to do after that is clearly no part of the act of registration, but a subordinate duty (as it is called by Harrison, C.J., in *Lawrie* v. *Ruthbun*, 38 U. C. R. 261) and is not a condition precedent thereto. That being so, the registration can be completed without the production of the owner's certificate. In this case then the acting registrar could have completed the registration of the Bentley mortgage the same day it was filed; moreover, it was a duty imperative on him to register it before registering any other instrument affecting the same land. S. 41 says every instrument "shall be registered in the order of time in which it is presented for that purpose." It was, therefore, his duty to have completed the registration of the Bentley mortgage—in the absence of any provision requiring him to delay doing so until the production of the owner's certificate. But I cannot find any such provision. In s. 59 it is directed that where two rival instruments at *the same time* registration preference is to be given to that one presented by the person producing the certificate. Even here, however,

other instrument must also be registered, though after the preferred one. This section by implication confirms that the production of the certificate is not necessary, for if that were necessary this proviso as to which shall be preferred would be needless, since only one of them could be registered at all.

But it is then contended that—granting that the registrar could and should have completed the registration of the Bentley mortgage—as a matter of fact he did not do so, and, therefore, when the Morris mortgage was registered on the 14th October, the Bentley mortgage had not then become "effectual to . . . render the land liable as security," etc., but on that day the Morris mortgage did become effectual, etc.; that it was not until March, 1890, the Bentley mortgage became an effectual security.

This is a very strong argument in favour of the Morris mortgage, and it is the one which has given me the only serious cause for hesitation which I have felt. Morris may well complain that had the registrar done his duty, the search made by his advocate in the register would have disclosed the Bentley mortgage and saved him from advancing his money. On the other hand, Bentley might reply that it would be hard on him that he should suffer from the neglect or omission of a public official; seeing that he (Bentley) had done all that he could or was required by the Act to do as to having his mortgage registered, and after getting a certificate that his mortgage was received, filed, and entered in the day book in the proper office. Here there are two innocent persons, one of whom, through no fault of his own, must incur the risk of loss. Which is it to be? The argument might press one that Bentley ought not to to be prejudiced by the neglect of duty of a public official over whom he has no control. See Tiffany on Registration, pp. 40, 41, and remarks of Harrison, C. J., in *Lawrie* v. *Rathbun*, *ante*.

However, I do not find myself driven to determine the weight due to such an argument, for s. 39 seems to afford a solution. It provides that "every instrument given in for registration" shall be entered in the day book by a short description "with the day, hour, and minute of filing, and for purposes of priority between mortgagees . . . the time of filing shall be taken as the time of registration." Now, by s. 41, "instruments registered in respect of or affecting the same estate or interest

shall . . . be entitled to priority, the one over the other, according to the time of registration."

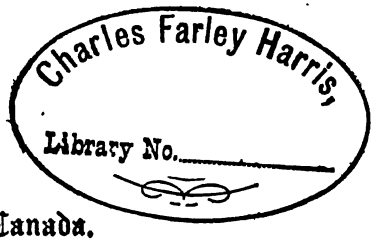
But, as we have just seen, "the time of filing" is the same as the time of registration;" therefore such instruments are entitled to priority according to the time of filing. Both sections require that the Bentley mortgage have priority.

If any doubt was left, it would be removed by the latter portion of s. 89, which directs that in entering memorials the registrar "shall take the time from the day book as the time of registration." What day and hour and minute, then, was the registrar to state in the Bentley memorial entered in March, 1890?

Surely, it was "11.10 a.m. on the 7th day of October, 1889," the time of filing, and this is what the registrar in fact did. Having reached this conclusion, it is not necessary to consider whether the defect existing in what purports to be the memorial of the Morris mortgage, namely, the omission to state therein the day, hour, and and minute of registration, as required by ss. 40, 42, 59, is sufficient to render such memorial invalid and ineffectual. It will be remembered that by s. 40 until a memorial as described by the Act is entered on the register, the instrument is not registered. Clearly, what purports to be a memorial of the Morris mortgage does not comply, in a very material respect, with the requirements of s. 42, and it might thence be urged that the Morris mortgage is not itself duly registered. I shall express no opinion on this further than to direct that the memorial shall be amended.

Nor shall I express any opinion on the contention that the advocate of Morris ought to have searched the day book, and that his own negligence in that respect contributed to his misfortune The day book is one required by the Act to be kept just as much as the register, and the Act does not suggest what book or whether any particular book is to be searched.

The order I make is that the registrar shall without any charge to the parties amend the memorials of the Morris mortgage in the register, and on the certificate No. 121, by stating therein the time of registration and that it is not necessary to invert the order of the memorials of these two mortgages, as their contents show which has priority.



Supreme Court of Canada.

ONTARIO.] [16TH NOVEMBER, 1891.

ELECTRIC DESPATCH CO. v. BELL TELEPHONE CO.

Contract—Telephone service—Transmission of messages—Construction of term—Breach.

The Bell Telephone Company sold to the Electric Despatch Company all its messenger, cab, etc., business in Toronto and the good-will thereof, and agreed, among other things, that they would in no manner, during the continuance of the agreement, transmit or give, directly or indirectly, any messenger, cab, etc., orders to any person or persons, company or corporation, except the Electric Despatch Company. An action was brought for breach of this agreement, such alleged breach consisting of the Bell Telephone Company allowing their wires to be used by their lessees for the purpose of sending orders for messengers, cabs, etc.

Held, affirming the judgment of the Court of Appeal, 17 A.R. 292, and of a Divisional Court, 17 O.R. 495, RITCHIE, C.J., doubting, that the telephone company could not restrict the use of the wires by their lessees; that being ignorant of the nature of communications made over the wires by persons using them, the company could not be said to "transmit" the messages within the meaning of the agreement, and that they were under no obligation, even if it were possible to do so, to take measures to ascertain the nature of all messages sent over the wires and prevent any being sent relating to messenger, cab, etc., orders.

Robinson, Q.C., and *Moss*, Q.C., for the appellants.

Lash, Q.C., for the respondents.

liquidation under the Winding-up Act, of his other co-debtor, jointly and severally liable, without first deducting the amount he has previously received from the other estate: R. S. C. c. 129, s. 62, the Winding-up Act.

2. Affirming the judgment of the Court below, that a person who makes a deposit with a bank after its suspension, the deposit consisting of cheques of third parties drawn on and accepted by the bank in question, is not entitled to be paid by privilege the amount of such deposit.

H. Abbott, Q.C., for the appellant.

H. Greenshields, for the respondent.

[16TH FEBRUARY, 1892.

In re BELLECHASSE DOMINION ELECTION.

AMYOT v. LEBRECQUE.

Election petition — Preliminary objections — Status of petitioner — Onus probandi.

The election petition was served upon the appellant on the 12th May, 1891, and on the 16th May the appellant filed preliminary objections, the first objection being as to the status of the petitioners. When the parties were heard upon the merits of the preliminary objections, no evidence was given as to the status of the petitioners, and the Court dismissed the preliminary objections.

On appeal to the Supreme Court:—

Held, reversing the judgment of the Court below, and following the decision of this Court in the *Stanstead* Case, *ante* p. 9, that the onus was on the petitioner to prove his status as a voter; GWYNNE, J., dissenting.

Amyot, for the appellant.

Belleau, Q.C., for the respondents.

In re ARGENTEUIL DOMINION ELECTION.

CHRISTIE v. MORRISON.

Election petition—Preliminary objections—Deposit of security—R. S. C. c. 9, s. 9 (f).

The preliminary objection in the case was that the security and deposit receipt were illegal, null, and void, the written receipt signed by the prothonotary of the Court being as follows: "that the security required by law had been given on behalf of the petitioners by a sum of $1,000, in a Dominion note, to wit, a bank note of $1,000 (Dominion of Canada) bearing the number 2914, deposited in our hands by the said petitioners, constituting a legal tender under the statute now in force." The deposit was in fact a Dominion note of $1,000.

Held, affirming the judgment of the Court below, that the deposit and receipt complied sufficiently with s. 9 *(f)* of the Dominion Controverted Elections Act, R. S. C. c. 9.

R. G. Code, for the appellant.

Abbott, Q.C., for the respondent.

In re LAPRAIRIE ELECTION PETITION.

GIBEAULT v. PELLETIER.

Election petition—Preliminary examination of respondent—Order to postpone until after session of Parliament—Effect of—Six months' limit—R. S. C. c .9, s. 32.

On the 23rd April, 1891, after the petition in this case was at issue, the petitioner moved to have the respondent examined prior to the trial so that he might use the deposition upon the trial. The respondent moved to postpone such examination until after the session, on the ground that being attorney in his own case, it would not "be possible for him to appear, answer the interrogatories, and to attend to the case, in which his presence was necessary, before the closing of the session." This

motion was supported by an affidavit of the respondent stating that it would be "absolutely necessary for him to be constantly in Court to attend to the present election petition," and that it was not possible "for him to attend to the present case, for which his presence is necessary, before the closing of the session." The Court ordered the respondent not to appear until after the session of Parliament. Immediately after the session was over an application was made to fix a day for the trial, and it was fixed for the 10th December, 1891, and the respondent was examined in the interval. On the 10th December the respondent objected to the jurisdiction of the Court on the ground that the trial had not commenced within six months following the filing of the petition, and the objection was maintained.

Held, reversing the judgment of the Court below, that as it appeared by the proceedings in the case and the affidavit of the respondent that the respondent's presence at the trial was necessary, in the computation of time for the commencement of the trial, the time occupied by the session of Parliament should not be included: R. S. C. c. 9, s. 32.

Choquette, for the appellant.

Lajoie, for the respondent.

[9TH MARCH, 1892.

DOMINION SALVAGE AND WRECKING COMPANY v. BROWN.

Appeal to Supreme Court of Canada — Action for call of $1000 — Future rights —Supreme and Exchequer Courts Act, R. S. C. c. 129, s. 29 (b).

The company sued the defendant B. for $1,000, being a call of ten per cent. on 100 shares of $100 each, alleged to have been subscribed by B. in the capital stock of the company, and prayed that the defendant be condemned to pay the said sum of $1,000 with costs. The defendant denied any liability, and said that he was not a shareholder; and the company's action was dismissed.

On appeal to the Supreme Court of Canada by the company,

Held, that the appeal would not lie, the amount being under $2,000 and there being no such future rights as specified in s-s. (*e*) of s. 29, which might be bound by the judgment.

Gilbert v. *Gilman*, 16 S. C. R. 189, followed.

The appeal was quashed without costs.

Goldstein, for the appellant.

S. H. Blake, Q.C., for the respondent.

MANITOBA.] [16TH NOVEMBER, 1891.

ASHDOWN v. MANITOBA FREE PRESS CO.

Libel—Provisions of Act relating to newspapers—Compliance with—Special damages—Loss of custom—50 V. cc. 22 and 23 (Man.)

By s. 13 of 50 V. c. 22 (Man.), the Libel Act, no person is entitled to the benefit thereof, unless he has complied with the provisions of 50 V. c. 23, "An Act respecting newspapers and other like publications." By s. 1 of the latter Act no person shall print or publish a newspaper until an affidavit or affirmation made and signed, and containing such matter as the Act directs, has been deposited with the prothonotary of the Court of Queen's Bench or Clerk of the Crown for the district in which the newspaper is published. By s. 2 such affidavit or affirmation shall set forth the real and true names, etc., of the printer or publisher of the newspaper and of all the proprietors, and by s. 6 if the number of publishers does not exceed four the affidavit or affirmation shall be made by all, and if they exceed four it shall be made by four of them; s. 5 provides that the affidavit or affirmation may be taken before a justice of the peace or commissioner for taking affidavits to be used in the Court of Queen's Bench.

Held, affirming the decision of the Court of Queen's Bench, 6 Man. L. R. 578, that 50 V. c. 23 contemplates and its provisions apply to the case of a corporation being the sole publisher and proprietor of a newspaper.

2. That s. 2 is complied with if the affidavit or affirmation states that a corporation is the proprietor of the newspaper and prints and publishes the same; GWYNNE, J., dissenting.

3. That the affidavit or affirmation, in case the proprietor is a corporation, may be made by the managing director.

4. That in every proceeding under s. 1 there is the option either to swear or affirm, and the right to affirm is not restricted to members of certain religious bodies or persons having religious scruples.

5. That if the affidavit or affirmation purports to have been taken before a commissioner, his authority will be presumed, and need not be proved in the first place.

Section 11 of the Libel Act requires actual malice or culpable negligence to be proved in an action for libel unless special damages are claimed.

Held, that such malice or negligence must be established to the satisfaction of the jury, and if there is a disagreement as to these issues the verdict cannot stand.

Held, further, that a general allegation of damages by loss of custom is not a claim for special damages under this section.

Per STRONG, J.—Damages by loss of custom must be specifically alleged and the names of the customers given; otherwise evidence of such damages is inadmissible.

McCarthy, Q.C., for the appellant.

Robinson, Q.C., for the respondents.

[17TH NOVEMBER, 1891.

WHELAN v. RYAN.

Assessment and taxes—Irregular assessment—By-law—Validating Acts—Effect of—Crown Lands.

In 1879 lands were purchased from the Dominion Government, but the patent did not issue until April, 1881. The patentee conveyed the lands, which in May, 1882, were mortgaged to R. In 1880 and 1881 the lands were taxed by the municipality in which they were situate, and the taxes not having been paid, they were in March, 1882, sold for unpaid

taxes. The purchaser at the tax sale received a deed in March, 1883, and by conveyances from him the lands were transferred to W., who applied for a certificate of title thereto. R. filed a caveat against the granting of such certificate.

By the statutes under which the lands were taxed the municipal council must, after the final revision of the assessment roll in every year, pass a by-law for levying a rate on all real and personal property assessed by such roll. No such by-law was passed in either of the years 1880 or 1881.

45 V. c. 16, s. 7, makes all deeds executed in pursuance of a sale for taxes valid, notwithstanding any informality in or preceding the sale, unless questioned within one year from the date of their execution, and 51 V. c. 101, s. 58, provides that "all assessments made and rates heretofore struck by the municipalities are hereby confirmed and declared valid and binding upon all persons and corporations affected thereby."

Held, affirming the decision of the Court of Queen's Bench, 6 Man. L. R. 565, PATTERSON, J., dissenting, that the assessments for the years 1880 and 1881 were illegal for want of a by-law and the sale made for unpaid taxes thereunder was void.

Held, per STRONG and GWYNNE, JJ., PATTERSON, J., contra:—

1. That the Acts 45 V. c. 16, s. 7, and 51 V. c. 101, s. 58, only cure irregularities but will not make good a deed that was absolutely void, as in this case.

2. That until the patent was issued by the Dominion Government, these lands were exempt from taxation. The patent did not issue until April, 1881. Hence the taxes for which the lands were sold accrued due while they were vested in the Crown.

Held, per STRONG, J., following *McKay* v. *Chrysler*, 8 S. C. R. 436, and *O'Brien* v. *Cogswell*, 17 S. C. R. 420, that the defects cured by 45 V. c. 16, s. 7, are only irregularities in the proceedings connected with the sale, as distinguished from informalities in the assessment and levying of the taxes.

S. H. Blake, Q.C., for the appellant.

Gormully, Q.C., for the respondent.

STEPHENS v. McARTHUR.

Assignments and preferences—49 V. c. 45, s. 2 (Man.)—Construction of—Transfer of personal property—Preference by—Pressure—Intent.

By the Manitoba Act 49 V. c. 45, s. 2, "every gift, conveyance, etc., of goods, chattels, or effects * * * made by a person at a time when he is in insolvent circumstances * * * with intent to defeat, delay, or prejudice his creditors, or to give to any one or more of them a preference over his other creditors or over any one or more of them, or which has such effect, shall, as against them, be utterly void."

Held, reversing the decision of the Court of Queen's Bench, 6 Man. L. R. 496, PATTERSON, J., dissenting, that the meaning of the word "preference" in this Act is that which has always been given to the expression when used in bankruptcy and insolvency statutes; it imports a voluntary preference and does not apply to a case where the transfer has been induced by the pressure of the creditor.

Held, further, that a mere demand by the creditor, without even a threat of legal proceedings, is sufficient pressure to rebut the presumption of a preference.

The words "or which has such effect" in the Act apply only to a case where that had been done indirectly which, if it had been done directly, would have been a preference within the statute. The preference mentioned in the Act being a voluntary preference, the instruments to be avoided as having the effect of a preference are only those which are the spontaneous acts of the debtor.

Molsons Bank v. *Halter*, 18 S. C. R. 88, approved and followed.

Held, *per* PATTERSON, J., that any transfer by an insolvent debtor which has the effect of giving one creditor a priority over the others in payment of his debt, or which is given with the intent that it shall so operate, is void under the statute, whether or not it is the voluntary act of the debtor or given as the result of pressure.

Moss, Q.C., and *Wade*, for the appellant.

Elliott, Q.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q.B.D.] [8TH JANUARY, 1892.

BEGG v. ELLISON.

Parties—Specific performance—Title to land—Interest of strangers in land—Adding them as third parties or defendants—Rules 328-331.

In an action by vendors against the purchaser for specific performance of a contract for the sale of land, it was alleged in the defence that the plaintiffs were the owners of an undivided half interest only in the land, and had no title to the other half; and in the reply that if the persons alleged to be the owners of the other half interest ever had any interest, it was barred by the Statute of Limitations, and the plaintiffs were the sole owners. The plaintiffs also alleged that the defendants had accepted the title. The plaintiffs were in possession. Upon the application of the defendant, before the trial, an order was made in Chambers allowing the defendant to serve a third party notice upon the persons alleged to be the owners of the other half. This order was set aside by a Divisional Court, and an order made staying all proceedings in the action until the plaintiffs should add the third parties as defendants to the action, and should make the necessary allegations against them so as to properly raise the question of the title to that part of the land to which they were alleged to have a claim.

Held, that neither order should have been made.

Rules 329 and 331 did not apply, because it was not a case for contribution, indemnity, or relief over; and Rules 328 and 330 did not apply, because it was not shown to be necessary or expedient to decide any question in the action as between the original parties, or either of them, and the third parties.

Per MACLENNAN, J.A.—The question in the action, so far as title is concerned, is whether the plaintiffs have such a title as the Court will compel the defendant to accept. If they clearly have such a title, they will succeed; if they clearly have not, they will fail; and if doubtful, the action will be dismissed. In any case, there is no occasion for deciding anything as between either of the original parties and the third parties.

The Consolidated Rules relating to third parties discussed.

Decision of the Queen's Bench Divisional Court, 11 Occ. N. 69, reversed.

Glenn, for the plaintiffs.

J. A. Robinson, for the defendant.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 1ST FEBRUARY, 1892.

PALMER v. LOVETT.

Attachment of debts—Proceeds of sale of land—Interest of judgment debtor in, as tenant by the curtesy—Disclaimer of interest—Security for costs—Garnishing proceeding—No power to order.

A judgment debtor, having a supposed interest as tenant by the curtesy in certain land, joined in a conveyance thereof by his daughter to a purchaser, in which it was recited that he was entitled to that estate. His judgment creditor thereupon attempted to garnish the purchase money in the hands of the solicitor who acted for the judgment debtor's daughter, and the

daughter claimed the whole of the purchase money, while the judgment debtor made no claim upon it. It also appeared that he never had claimed, and now expressly disclaimed, any interest as tenant by the curtesy, and had joined in the conveyance at the instance of the solicitor for the purchaser, who was also the solicitor for the judgment creditor.

Held, that the money in hands of the solicitor could not be garnished by the judgment creditor.

Per ARMOUR, C.J.—Assuming that the judgment debtor was tenant by the curtesy in the land sold, upon its sale he became entitled only to a life use in the purchase money, and this use could not be reached by garnishee process in the manner attempted.

Per STREET, J.—There is no debt due from the solicitor to the judgment debtor, nor can it be said that the moneys in the hands of the former are subject to any trust in favour of the latter, nor that any claim on his part affecting them exists. If he had an interest in the lands, he, in effect, released it to his daughter without any consideration, and the money is hers unless the release to her should be set aside as voluntary and a fraud upon his creditors.

The judgment creditor obtained an attaching order, which was set aside by the local Judge who granted it; the judgment creditor then appealed to a Judge in Chambers unsuccessfully, and had given notice of a further appeal to a Divisional Court, when his proceedings were stayed by an order of the Master in Chambers requiring him to give security for costs, on the ground that he was insolvent and was proceeding for the benefit of another.

Held, that the order for security could not be sustained; the judgment creditor was not proceeding either by action or petition; and there was no authority for ordering security.

Re Rees, 10 P. R. 425, overruled.

Bartram, for the judgment creditor.

Middleton, for the garnishee and the claimant.

COVENTRY v. McLEAN.

Evidence—Action for relief against re-entry for non-payment of rent—Admissibility of evidence to show misrepresentations by lessee in obtaining lease.

To an action for relief against a re-entry made by a landlord for non-payment of rent, the defendant pleaded that she had been induced to grant the lease by reason of representations made by the plaintiff to the effect that he would improve and beautify the demised premises, which would enhance the value of other lands of the defendant, but that the plaintiff had not done as he represented he would, and that the defendant had been thereby damnified.

Held, that evidence tendered by the defendant to establish the truth of this defence was admissible in answer to the claim of the plaintiff for relief.

The origin both of the suit for specific performance and of the suit for relief against a re-entry for non-payment of rent is in the equitable jurisdiction of the Court; the compelling performance in the one and the granting relief in the other is in the judicial discretion of the Court, and in each the Court has regard to the conduct of the party seeking to compel such performance or to obtain such relief.

Wallace Nesbitt, for the plaintiff.

Walter Cassels, Q.C., for the defendant.

In re ELLIOTT v. BIETTE.

Prohibition—Division Court—Judgment for $200.70—Interest—Amendment—Jurisdiction—Part prohibition.

A suit was brought in a Division Court to recover the amount of a promissory note and interest. At the time of the trial the amount of the note and interest was under $200, but the Judge reserved his judgment, and when he came to give it he calculated interest up to that day and by inadvertence gave judgment for $200.70—a sum seventy cents beyond the jurisdiction of the Division Court.

Upon a motion for prohibition :—

Held, that the Judge could amend his judgment by striking out the seventy cents.

The award of interest did not oust the Court of jurisdiction; there was want of jurisdiction only in so far as the judgment exceeded $200; and prohibition should go only in respect of the excess.

Prohibition *quousque* granted, that is, until the Judge should amend his judgment by striking out the seventy cents; or a partial prohibition prohibiting the enforcing of the judgment so far as the excess of seventy cents was concerned.

W. H. P. Clement, for the plaintiffs.

W. M. Douglas, for the defendant.

ROSS v. BUCKE.

Defamation—Slander—Privileged occasion—Qualified privilege—Absence of actual malice—Evidence—Admissibility of—Falsity of slander—Justification not pleaded.

The defendant, who was the superintendent of a public asylum, said to T., a man who had formerly been a servant at the asylum, that the plaintiff, a maid-servant at the asylum, who was engaged to be married to T., was "a contemptible thief." Justification was not pleaded. The evidence shewed that the defendant honestly believed in the truth of the words spoken and that he had reasonable grounds for his belief.

Held, that the occasion on which the words were spoken was one of qualified privilege, and that the plaintiff could not recover in slander without proof of actual malice, the burden of which lay on the plaintiff. On the evidence, the plaintiff failed to shew actual malice; and the use of the qualifying adjective, "contemptible," did not afford evidence of actual malice. The case should, therefore, have been withdrawn from the jury.

Coxhead v. *Richards*, 2 C. B. 569; *Whiteley* v. *Adams*, 15 C. B. N. S. 392; and *Stuart* v. *Bell*, [1891] 2 Q. B. 341, followed.

Semble, *per* FALCONBRIDGE, J., that the defendant had not such a recognized interest in T.'s welfare as to justify as privileged the communication made to him, without any request on T.'s part.

Semble, also, *per* FALCONBRIDGE, J., that evidence of the falsity of the slander given on the plaintiff's examination in chief should not have been received.

W. R. Meredith, Q.C., and *Weld*, for the plaintiff.

Osler, Q.C., and *Bartram*, for the defendant.

IN CHAMBERS.

[BOYD, C., 17TH FEBRUARY, 1892.

MURRAY v. MAIL PRINTING COMPANY.

Discovery—Libel—Examination of officer of newspaper publishing company—Editorial writer—Disclosure of facts.

In an action against a newspaper publishing company for a libel contained in an article written by a member of the newspaper staff, who procured special information therefor, under the supervision of the managing editor, and in which action the defendants pleaded justification :—

Held, that the writer was not in the position of a sub-editor, nor could he be called an officer of the company, and he was not examinable for discovery under Rule 487.

Held, also, that no sufficient foundation was otherwise laid for his examination; for it did not appear that he could give information of any facts, but merely that he could indicate where he procured evidence of the facts in dispute upon the plea of justification.

W. B. Raymond, for the plaintiff.

F. A. Hilton, for the defendants.

[MEREDITH, J., 21ST JANUARY, 1892.

In re McKENZIE.

In re LIND.

In re CAMPBELL.

Lunatics—Maintenance of—Inspector of prisons and public charities—Money in Court—R. S. O. c. 245, ss. 1, 48, 49, 61.

Sections 48 and 49 of the Act respecting Lunatic Asylums and the Custody of Insane Persons, R. S. O. c. 245, providing that the inspector of prisons and public charities may take possession of the property of lunatics to pay for maintenance, do not apply to money in Court.

Where the property of the lunatic is money in Court, the inspector must apply for payment out under s. 61, and must shew clearly that the person to whom the money in Court belongs is a lunatic and that the purpose for which the money is sought is to pay charges for maintenance of the lunatic in a public asylum; but it is not necessary, having regard to s. 1, s-s. 2, that the person shall have been or shall be declared a lunatic.

J. F. Edgar, for the inspector.

F. W. Harcourt, for the official guardian.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 5TH MARCH, 1892.

FISHER v. BROCK.

Chattel mortgage—Fraudulent preference —Intent—Pressure—Clerical error in name of claimant in issue—Amendment.

Interpleader issue. The plaintiffs claimed under two chattel mortgages, and the defendants were execution creditors.

The plaintiffs were members of a firm styled, "M. Fisher, Sons, & Co." and their individual names, as given in the first chattel mortgage, were Edward Fisher, Robert Mar Shaw,

Joseph Whiteley Shaw, Willliam Dale Shaw, and Richard L. Gaunt the younger. In the interpleader issue Robert Mar Shaw was called Robert Mar Fisher, and Richard L. Gaunt the younger was called Richard L. Gaunt. An amendment was asked at the trial, but the Judge held he had no authority to make the amendment; that his duty as a Judge at *nisi prius* was simply to try the question that had been referred, and no other; and he non-suited the plaintiffs.

Held, that the trial Judge had the power to make the amendment asked for, under the C. L. P. Act, 1852, s. 222, and it should have been allowed.

The point was raised whether the chattel mortgages were fraudulent preferences, and should be held void as against the execution creditors.

The first chattel mortgage, under which the goods were afterwards taken possession of, was dated 27th August, 1889, and was filed on 9th September following.

A second chattel mortgage was given, dated 5th February, 1890, purporting to include substantially the same goods as the first mortgage, and other goods. The plaintiffs acted and took possession under the first chattel mortgage, and appeared to rely particularly and base their claim upon it.

The execution of the defendants Brock & Co. against Levi Stockton, the mortgagor, was placed in the sheriff's hands on 29th March, 1890, and that of the defendants Calder & Co. on 16th August, 1890. The plaintiffs took possession on 11th August, 1890, of the goods covered by their first chattel mortgage, and remained in possession until 20th August, when the sheriff seized the goods under the executions placed in his hands by the defendants, and, on notice of claim served on him by the plaintiffs, took out the interpleader summons.

When the chattel mortgage was given, it did not appear that the plaintiffs exercised a very strong pressure to obtain it; at least they had not sued, nor threatened to sue the debtor, though they had written several times, pressing for the account. The debtor gave the chattel mortgage in order to get an extension of time to enable him to carry on his business.

Held, KILLAM, J., dissenting, that the chattel mortgage was not given by the mortgagor of his own mere motion, and as a favour or bounty, proceeding voluntarily from himself, but it was

given at the request and by the pressure of the mortgagee, for a valuable and *bona fide* consideration, of which the mortgagor obtained the benefit. His subsequent actions and dealings with his creditors did not show that, in giving the chattel mortgage to the plaintiffs, he had any intent to defeat, delay, or predjudice his other creditors, or to give a fraudulent preference to the plaintiffs.

The non-suit was set aside, a verdict entered in favour of the plaintiffs, and the appeal allowed with costs.

Ewart, Q.C., for the plaintiffs.

Culver, Q.C., for the defendants.

SPARHAM v. CARLEY.

Pleading—Demurrer to plea in part—Discontinuance—Amendment.

The plaintiff sued the defendant on several counts, of which three were on special agreements to pay, in different ways, a promissory note of the defendant in favour of the plaintiff.

Among other defences, the defendant pleaded to these three counts that the promise in each of the counts set up was in writing and in certain words set out in the plea. The plaintiff then demurred to the plea, in so far as it was pleaded to two of the counts.

The demurrer was allowed by BAIN, J.

The defendant appealed, contending that the plaintiff could not properly thus demur to the plea in part, and that the doing so worked a discontinuance which entitled the defendant to judgment upon the demurrer.

Held, that the plea, if bad as not being an answer to the two counts, was wholly bad. The demurrer should have been to the plea as a whole. This point was not raised on the original argument. The plaintiff should be allowed to amend his demurrer without costs, and the judgment allowing the demurrer should be affirmed. The defendant to be at liberty, if he had not already done so, to plead the general issue to the three counts.

Ewart, Q.C., and *Bradshaw*, for the plaintiff.

Elliott, for the defendant.

BRITISH LINEN CO. v. McEWEN.

Foreign judgment—Action on—Pleas—Demurrer—Defences that might have been pleaded to the original cause of action.

Appeal from the decision of KILLAM, J., 12 Occ. N. 55.

The plaintiffs applied to have the judgment on the demurrer to the sixth plea reversed and judgment entered for them, and the defendant applied to have the judgment on the demurrer to the third plea reversed and judgment entered for him.

Held, that the defendant's appeal against the allowance of the demurrer to the third plea must be dismissed.

That as to the sixth plea, the judgment must be reversed, and the plaintiffs' demurrer allowed. That under the statute 48 V. c. 15, s. 45, s.-s. 2, the defendant may plead to the action on its merits, and set up any defence to the action as brought on the judgment, or he may set up any defence which he might have pleaded to the original cause of action for which the judgment was recovered, in the Court in which it was recovered.

The defendant sought by his plea to set up the Statute of Limitations. Whether that would have been a defence in Scotland, was a question of foreign law. He had not pleaded the foreign law, and it was necessary to do so; therefore the plea was bad.

The plaintiffs should have the costs of both applications.

Tupper, Q.C., and *Phippen*, for the plaintiffs.

Richards and *Bradshaw*, for the defendants.

ALLOWAY v. CAMPBELL.

Real Property Act—Plaintiff in issue nonsuited—Subsequent proceedings—Costs—Application for certificate withdrawn.

Appeal from the decision of TAYLOR, C.J., 12 Occ. N. 53.

Held, that the appeal must be dismissed with costs.

The land had not been brought under the Act. The caveators intervened to prevent this being done. Their petition was authorized for a particular purpose only, not as a method of procedure for the establishment generally of their claim to lands, but for the purpose of ascertaining whether they had a right to prevent the applicant from bringing the land under the Act.

The object of the caveat was accomplished, and it would be wrong to use the proceedings authorized by the Act for any further purpose.

The application was the foundation of all the proceedings in Court, and when the application was withdrawn, the jurisdiction of the Court to proceed further in the matter, otherwise than to order the applicant to pay compensation to the caveator for the expense he had been put to by the application, came to an end.

Ewart, Q.C., and *C. P. Wilson*, for the caveators.
Howell, Q.C., and *Cumberland*, for the caveatee.

TAYLOR v. GARDINER.

Sale of goods—Counter-claim for damages for breach of warranty—Authority of agent to warrant—Assessment of damages.

This was an action upon a promissory note given as part payment of the price of a horse, and the defendants filed a counter-claim for damages for breach of a warranty, alleged to have been given on the sale.

At the trial the Judge found the plaintiff entitled to a verdict for the amount of the note, $375, and he found the defendants entitled to $600 damages upon the counterclaim; so a verdict was entered in their favour for $225.

The plaintiff then moved to set aside the finding on the counterclaim or to reduce the amount, to enter a verdict for the plaintiff, or for a new trial.

The plaintiff, the owner of the horse, lived in Ontario; he gave the horse into the custody of one Mitchell, who was engaged in the business of bringing horses to Manitoba for sale, to bring it to this Province and sell it here. Mitchell placed it in a livery stable and sold it to the defendants for $750, taking in his own name two promissory notes of $375 each; these he transferred to the plaintiff. The plaintiff gave Mitchell no authority to warrant the horse, but he handed him the pedigree, leaving the selling and price in his hands. The defendants dealt with Mitchell as the owner.

The horse was sold for breeding purposes and the warranty alleged to have been given was that he was an imported Clydesdale and a good worker. That a warranty was given was found in favour of the defendants. Mitchell had no express authority to warrant, and the question was, had he, under the circumstances, an implied authority, so that the warranty he was found to have given would bind the plaintiff.

Held, that the plaintiff by his conduct had clothed Mitchell with the apparent ownership of the horse; his powers as to fixing price and terms of sale were unlimited; by so acting he authorized Mitchell to make all such warranties as are usual in the ordinary course of the business of selling horses, to do all that was necessary and usual to be done to obtain a purchaser.

The plaintiff had adopted the contract made by Mitchell, and was suing upon one of the notes given in pursuance of that contract.

The horse was sold for $750. There was evidence that he was useless for breeding purposes, and that as an ordinary working horse he might be worth $250. The trial Judge allowed as damages the difference, $500, to which he added $100, apparently for loss of the season and for the expense of his keep before it was ascertained that he was useless for the special purpose for which he was bought. There was no evidence of any warranty that the horse was a good breeder, only that he was an imported Clydesdale.

Held, that the damages under the counter-claim were estimated upon a wrong basis. The item of $100 could not be sustained when there was no warranty that the horse was fit for breeding purposes.

The plaintiff was entitled to a verdict for the amount of the note, $375, with interest $72.60, or $447.60, and the defendants were entitled to a verdict on their counter-claim for $375. The verdict in favour of the defendants should therefore be set aside and a verdict for $72.60 entered in favour of the plaintiff, with costs of the motion in term.

J. Martin, for the plaintiff.

W. J. Cooper, for the defendants.

[DUBUC, J., 19TH FEBRUARY, 1892.

LAUDALE v. McLAREN.

Parties—Mortgage suit—Bill filed by survivor of three trustees—Demurrer for want of parties.

Demurrer to plaintiff's bill, (1) for want of parties; (2) for want of equity.

The bill was filed by the plaintiff to foreclose a mortgage made by the defendant in favour of three persons, of whom the plaintiff was the only survivor. The first paragraph of the bill showed that in the mortgage in question the three mortgagees were described as trustees. In the sixth paragraph it was alleged that the moneys secured by the mortgage were the moneys of the American Mortgage Company, and were advanced to the defendant by that company, and that the plaintiff and the two other mortgagees had not, at any time, any beneficial interest in the moneys. The bill further alleged the deaths of the two other mortgagees.

It was contended in support of the demurrer that the representatives of the deceased mortgagees should have been made parties, as also the American Mortgage Company.

Held, that the representatives of the deceased joint mortgagees were not necessary parties: 49 V. c. 18, s. 13, and 52 V. c. 16, s. 82 (Man.) Under Gen. Ord. 39, the American Mortgage Company was not a necessary party.

Demurrer overruled with costs.

Aikins, Q.C., for the plaintiff.
Munson, for the defendant.

[BAIN, J., 24TH FEBRUARY, 1892.

EWART v. HANOVER.

Staying proceedings—Two actions by same plaintiff—First, out of Court—Application to stay second—Time for making application.

The plaintiffs appealed against an order of the Referee staying all proceedings in this action until the costs of the defendant, in a former suit brought by the plaintiffs against the defendant, should be paid, and the order directed that the costs of the former suit be taxed by the Master.

It appeared that the writ of summons in the former action was issued in September, 1887, and was served on or about the 29th October following, that the defendant entered an appearance in November, 1887, and that since then no further proceedings had been taken. The plaintiffs were therefore out of Court in this action by the C. L. P. Act, 1852, s. 58.

The appeal was allowed and the order of the Referee set aside with costs.

The former action decided nothing and it was out of Court, and the defendant could not tax against, or legally collect from, the plaintiffs any costs of that action. It could not be said that the plaintiffs were oppressing or vexatiously harassing the defendant by bringing the present action.

The objection taken that such an application cannot be made until after the defendant has appeared is probably a valid one. The application is analogous to one for security for costs, where the order, if granted, is that proceedings be stayed until the security be given; and an application for security for costs cannot be made until after the defendant has appeared.

C. P. Wilson, for the plaintiffs.

Hough, for the defendant.

Supreme Court of Canada.

ONTARIO.] [17TH NOVEMBER, 1891.

CITY OF HAMILTON v. TOWNSHIP OF BARTON.

Municipal corporation—Powers of—Right to enter on lands of another municipality for sewage purposes—Restrictions—R. S. O. c. 184, s. 479, s-s. 15—51 V. c. 28, s. 20.

The Municipal Act of Ontario, R. S. O. c. 184, by s. 479 gives power to one municipality to enter upon the lands of another for the purpose of extending a sewer into or connecting with an existing sewer of the latter upon such terms and conditions as shall be agreed upon between the respective municipalities, and, failing an agreement, upon terms and conditions to be determined by arbitration. If the municipality into which the entry is proposed objects thereto, the arbitrators shall determine not merely the said terms and conditions, but whether or not such entry shall be allowed at all.

By 51 V. c. 28, s. 20, a municipal council may pass a by-law for taking land in or adjacent to the municipality necessary or convenient for the purpose of opening, making, etc., drains, sewers, or water-courses within its jurisdiction, or enter upon, take, and use any land not adjacent to the municipality for the purpose of providing an outlet for any sewer, but subject always to the restrictions contained in the Municipal Act.

Held, affirming the judgment of the Court of Appeal, 17 A. R. 346, that the latter Act did not take away the necessity for having the terms and conditions of entering upon lands of another municipality settled by agreement or by arbitration as provided by s. 479 of the Municipal Act.

MacKelcan, Q.C., and *Moss*, Q.C., for the appellants.

S. H. Blake, Q.C., for the respondents.

[8TH FEBRUARY, 1892.

In re WEST NORTHUMBERLAND DOMINION ELECTION.

In re NORTH PERTH DOMINION ELECTION.

Dominion Controverted Elections Act—Appeal—Deposit — Proper officer— R. S. C. c. 9, s. 51—54 & 55 V. c. 20, s. 12.

By s. 51 of the Controverted Elections Act, R. S. C. c. 9, as amended by 54 & 55 V. c. 20, s. 12, a party desiring to appeal from the decision of a Judge on a preliminary objection, or from the decision of the Judges who have tried the petition, is to deposit the sum specified as security for costs "with the clerk of the Court which gave such decision, or of which the Judges who gave such decision are members, or with the proper officer for receiving moneys paid into such Court." By s. 4 of R. S. C. c. 9, as amended, the distribution of cases for trial in Ontario between the Court of Appeal and the several Divisions of the High Court of Justice shall, if not prescribed by the law of the Province, or practice of the Court, be arranged by the Judges.

In the North Perth election case the petition was filed in the Chancery Division and assigned for trial to two Judges of the Queen's Bench Division. The deposit was made with the registrar of the Chancery Division. In the West Northumberland case the petition was filed in the Court of Appeal and tried before two Judges of one of the Divisions of the High Court the deposit being made with the registrar of the Court of Appeal. On motion to quash the appeal :—

Held, that making the deposit with the registrar of the Court in which the petition was filed was a sufficient compliance with the Act.

Held, further, that as in the North Perth case, the deposit was made with the officer who was the accountant of the Supreme Court of Judicature, and, therefore, the proper officer to receive moneys paid into any of the Divisions of the Court, the statute was on another ground sufficiently complied with.

The motions were dismissed with costs.

Lash, Q.C., and *A. Ferguson*, Q.C., for the motions.

Aylesworth, Q.C., *contra*.

NEW BRUNSWICK.] [17TH NOVEMBER, 1891.

SIMONDS v. CHESLEY.

Trespass to land—Title—Application for new trial—Misdirection—Misconduct of jurors—View of locus in quo—Nominal damages.

S. brought an action against C. for trespass to his land by placing ship's knees thereon, whereby S. was deprived of the use of a portion of the land and prevented from selling or leasing the same. On the trial S. gave no evidence of substantial damage suffered by the trespass, but contended that an action was necessary to preserve his title. The defendants, however, did not set up title in themselves, but only denied that the plaintiff had title. Before the verdict was given the jury viewed the premises, one of the conditions on which the view was granted being that "nothing said or done by any of the parties or their counsel should prejudice the verdict." The jury found a verdict in favor of C., and S. moved for a new trial on the ground of misdirection and misconduct of the defendant's counsel at the view. The Court below refused a new trial.

Held, that, by the terms on which the view was granted, S. could not set up misconduct thereat in support of his application.

Held, further, that there was no misdirection, but if there was, all that S. could obtain at a new trial would be nominal damages, and it was properly refused by the Court below.

The appeal was dismissed with costs.

Skinner, Q.C., and *Simonds*, for the appellant.

Currie, for the respondent.

[22ND FEBRUARY, 1892.

ESSON v. McGREGOR.

Promissory note—Failure of consideration—Laches—New trial.

In an action on a promissory note the defence set up was that it was given in purchase of a machine for polishing wood which machine did not do the work for which it was purchased and which it was represented to do. At the trial the evidence showed that the machine had been used for a long time in connection

with building cars; that the work was under control of a contractor with the defendant; and that the superintendent of the defendant's establishment had inspected the cars as they were finished and delivered, as well as watched the progress of the work. Evidence was offered on behalf of the defendant to show that the contractor had never told him that the machine was defective and he never knew it until the case was tried; and that the machine could not be used until a fan had been attached to it for keeping off the dust. The defendant himself was not examined, nor was an effort made to obtain the evidence of the contractor, who had left the Province. The jury found in favour of the plaintiff, and a new trial was refused on the ground that the defendant must be charged with the knowledge of the contractor, or at all events his superintendent was in a position to discover the manner in which the machine worked.

On appeal to the Supreme Court of Canada:—

Held, that the new trial was properly refused.

McLeod, Q.C., for the appellant.

Alward, Q.C., for the respondent.

[23RD FEBRUARY, 1892.

GUARDIAN ASSURANCE COMPANY v. CONNELY.

Fire insurance—Application—Description of building—Variance—Falsa demonstratio non nocet.

An insurance policy insured goods in a one-and-a-half storey building, with shingled roof, occupied as a store-house for storing horse feed and provisions; said building shown on plan on back of application for insurance as "feed-house," situate attached to woodshed of assured's dwelling house. The building marked "feed-house" on the plan was not a one-and-a-half storey building with shingled roof, was not attached to the woodshed, and was not used as a store-house, but another building on the plan answered the description in the policy, and the goods insured were in the last mentioned building when they were destroyed by fire. The plan had been drawn by a canvasser who had obtained the application. He was not a salaried officer of

the insurance company, but received a commission on each policy obtained through his efforts.

The insurance company refused to pay the loss, claiming that the policy was made void by the alleged misrepresentation as to the building. On the trial of an action on the policy the jury found for the plaintiff, leave being reserved to move for a nonsuit on the ground of misrepresentation. The full Court refused to nonsuit.

Held, affirming the judgment of the Court below, that there was no misrepresentation; that the company was in no way damnified by the misdescription in the plan, and the maxim *falsa demonstratio non nocet* applied; that if that maxim did not apply the matter was one for the jury, who had pronounced on it in favour of the assured; and that it was evident that the intention was to insure goods in the building which really contained them.

Held, also, that the canvasser could not be regarded as the agent of the assured, but was the agent of the company, which were bound by his acts and could not take advantage of his mistake.

Weldon, Q.C., for the appellant.

McLeod, Q.C., for the respondents.

British Columbia.] [17th November, 1891.

POIRIER v. BRULÉ.

Contract—Rescission—Mistake—Performance of conditions—Revocation of trust.

By a deed made between B., grantor, of the first part, P., grantee, of the second part, and certain named persons, trustees, of the third part, B. conveyed his farm with the stock and chattels thereon to the trustees. The trusts declared in the deed were that the grantee should perform certain conditions intended for the support and maintenance and other advantage of the grantor, and if he survived the grantor, the trustees were to convey the property to him; if the grantor should survive, the trustees should reconvey to him. The deed was executed and acted on for some years, when an action was brought by B. to have it set aside on the ground of mistake, he alleging that when he executed

it, being illiterate and not understanding the English language, he did not know its terms. The trial Judge found this allegation proved by the evidence, and ordered the deed to be set aside. The full Court on appeal held against this finding of mistake, but affirmed the decision setting aside the deed on the ground that P., the grantee, had not performed the conditions on which his right to the property, in case he survived, depended.

On appeal to the Supreme Court of Canada :—

Held, affirming the decision of the Court below, that P. having failed to perform the obligations which he had undertaken, the trust in his favour failed and the trustees held the property in trust for B., in whose favour the law raised a resulting trust.

S. H. Blake, Q.C., for the appellant.

Gemmill, for the respondent.

[20TH NOVEMBER, 1891.

BOWKER v. LAUMEISTER.

Deed—Construction of—Trust—Parol evidence of—Enforcement—Findings of fact—Non-interference with.

A suit was brought to enforce an alleged trust in a deed absolute on its face, or, in the alternative, to have the property reconveyed or sold upon the terms of the alleged agreement. The defendant claimed that he had given valuable consideration for the property, which had been accepted by the plaintiff in full satisfaction and payment. At the trial parol evidence was given to establish the alleged trust and a decree was made granting the alternative relief prayed for and directing the property to be sold and the proceeds applied as the plaintiff claimed had been agreed. The Court affirmed this decree.

Held, that the existence of the trust having been found as a fact by the Court of first instance and the finding having been affirmed by the full Court, it should not be disturbed; and the appeal was dismissed with costs.

S. H. Blake, Q.C., for the appellant.

Robinson, Q.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [8TH JANUARY, 1892.

ROBINSON v. HARRIS.

Specific performance—Contract — Exchange of lands—Speculative character of properties—Time — Repudiation — Notice to complete—Reasonable notice—Title not in plaintiff—Election to treat contract as binding—Parties—Matter of conveyance.

An appeal by the defendant from the judgment of the Queen's Bench Divisional Court, 21 O. R. 43, was dismissed with costs, the Court being equally divided.

HAGARTY, C.J.O., with whom OSLER, J.A., concurred, thought that the appeal should be allowed on the ground that the one day's notice of repudiation of the contract was, under the circumstances, sufficient.

BURTON and MACLENNAN, JJ.A., thought that the appeal should be dismissed on the ground that no reasonable notice calling on the plaintiff to carry out the contract had ever been given.

James Reeve, Q.C., for the appellant.

F. E. Hodgins, for the respondent.

[12TH FEBRUARY, 1892.

McCLOTHERTY v. GALE MANUFACTURING CO.

Master and servant—Negligence—Machinery—"Defect"—"Arrangement" Workmen's Compensation for Injuries Act, R. S. O. c. 141—52 V. c. 23.

The plaintiff was employed in the laundry department of the defendants' factory, and while she was standing on a bench to

open a window for the purpose of letting steam and hot air escape, her hair was caught by an unguarded revolving horizontal shaft which passed through the room near the ceiling and in front of the window, and she was severely injured.

Held, BURTON, J.A., dissenting, affirming the judgment of the Queen's Bench Division in favour of the plaintiff, that she could not be said to have been doing an act so entirely unconnected with her employment and duties as to be regarded as a mere volunteer, and, as such, outside the protection of the Act; and there was a "defect in the arrangement" of the machinery within the meaning of the amending Act, 52 V. c. 23, s. 3, that is, an element of danger arising from the position and collocation of machinery, in itself perfectly sound and well fitted for the purpose to which it is to be applied and used.

W. Nesbitt and *F. J. Dunbar*, for the appellants.

N. Murphy, Q.C., for the respondent.

[18TH FEBRUARY, 1892.

In re LILLEY AND ALLIN.

Mandamus—Revising officer—Electoral Franchise Act, R. S. C. c. 5—Objection to name on list—Notice—Grounds of objection.

The Queen's Bench Division, 21 O. R. 424, having ordered a mandamus to issue directing a revising officer to consider the objections to the qualification of certain persons whose names appeared on the preliminary voters' list, and the revising officer having obeyed the mandamus, this Court declined to consider the question of the right to grant the mandamus.

A notice of application to have a name removed from the voters' list giving as the ground of objection only the statement "not qualified" is sufficient.

Hellmuth and *H. D. Gamble*, for the appellants.

Aylesworth, Q.C., for the respondent.

[1ST MARCH, 1892.

HAMILTON v. COUSINEAU.

Malicious prosecution—Reasonable and probable cause—Jury.

In an action for malicious prosecution, it is a question for the jury and not for the Judge whether the defendant acted upon reasonable and probable cause.

If there is any evidence it must be submitted to the jury, and the Judge cannot withdraw the case from them because in his opinion there was reasonable and probable cause for the prosecution.

Judgment of the Queen's Bench Division reversed; BURTON, J.A., dissenting.

W. Nesbitt, for the appellant.

Lount, Q.C., for the respondent.

MARTHINSON v. PATTERSON.

Bills of sale and chattel mortgages—Priorities—Defect—Possession—Consideration.

Taking possession of mortgaged chattels does not make good a defective chattel mortgage as against a subsequent chattel mortgage existing at the time such possession is taken, though not in default.

If both mortgages are defective, priority of time will prevail, but it is not a fatal defect, in the absence of bad faith, that the consideration for the subsequent mortgage is less than the amount mentioned therein and stated in the affidavit of *bona fides* to be secured.

Hamilton v. *Harrison*, 46 U. C. R. 127, considered.

Judgment of the Queen's Bench Division, 20 O. R. 720, reversed, and that of STREET, J., at the trial, 20 O. R. 125, restored.

Masson, Q.C., for the appellants.

Shepley, Q.C., for the respondents.

C. P. D.]

ATTORNEY-GENERAL v. VAUGHAN ROAD COMPANY.

Tolls—Toll roads—Ways—Private Act—General Act—Amendments—R. S. O. c. 159—53 V. c. 42.

The Act 53 V. c. 42, which extends in certain particulars the provisions of the general Road Companies' Act, R. S. O. c. 159, as to repairs, and is declared to apply whenever a road subject to that general Act is out of repair, does not apply to the defendant company, which was incorporated by special Act in which were included the sections of the general Act dealing with repairs.

Judgment of the Common Pleas Division reversed; HAGARTY, C.J.O., dissenting.

Bain, Q.C., and *Kappele*, for the appellants.

S. H. Blake, Q.C., and *Lawrence*, for the respondent.

[8TH MARCH, 1892.

COUNTY OF HALTON v. GRAND TRUNK R. W. CO.

Bond—Condition—Breach—Bonus—Liquidated damages.

In 1874 the county of Halton gave to the Hamilton and North-Western Railway Company a bonus of $65,000 to be used in the construction of the railway, upon the condition that the company should remain "independent" for twenty-one years. In 1888 the Hamilton and North-Western Railway Company became (as was on the facts held) in effect merged in the Grand Trunk Railway Company and ceased to be an independent line.

Held, affirming the judgment of the Common Pleas Division and of ROBERTSON, J., at the trial, that there had been a breach of the condition entitling the plaintiffs to recover the whole amount of the bonus as liquidated damages.

S. H. Blake, Q.C., and *W. Cassels*, Q.C., for the appellants.

Robinson, Q.C., and *Bain*, Q.C., for the respondents.

BOYD, C.] [1ST MARCH, 1892.

FEWSTER v. TOWNSHIP OF RALEIGH.

Reference—Consent—Special referee—Jud. Act, s. 101—Order referring all questions of fact in controversy—Determination of question of liability.

Except by consent, the Court has no power to order a reference under s. 101 of the Ontario Judicature Act, R. S. O. c. 44, to any person other than an official referee or the Judge of a County Court.

Where the question of the defendants' liability in an action is expressly raised on the pleadings, such question should be determined before a reference of all the questions of fact in controversy, including the amount of damages, is ordered.

Matthew Wilson, Q.C., for the appellants.

C. J. Holman, for the respondent.

[8TH MARCH, 1892.

STEPHENS v. GORDON.

Ways—Timber—Removal—"Necessary."

The plaintiff was the owner of a farm of about a mile in breadth and five-sixths of a mile in length. About two-thirds of the farm was heavily wooded, and the woodland was bounded by a road at each end, but along its face was bounded by cleared land. The defendant became the purchaser of the trees and timber upon the land, under an agreement which provided that the purchaser should at all times within three years have full liberty to enter upon the lands and to remove the trees and timber in such manner as he might think proper, not interfering with the enjoyment of the plaintiff save in so far as might be necessary. To take timber from the centre of the wooded belt through the woodland to the roads would have cost more than the timber was worth.

Held, that the word "necessary" was to be reasonably construed, and that this timber might be taken across the cleared land.

Osler, Q.C., for the appellant.

Matthew Wilson, Q.C., for the respondent.

STREET, J.]

YOUNG v. MIDLAND R. W. CO.

Railways—Expropriation—Compensation—Life tenant—C. S. C. c. 66, s. 11—24 V. c. 17, s. 1—Statute of Limitations.

Although under C. S. C. c. 66, s. 11, as amended by 24 V. c. 17, a railway company could obtain a good title in fee simple to expropriated lands by a conveyance from the tenant for life thereof, they were not justified in paying the compensation money to the tenant for life; and where such payment was made in 1871, the company was ordered to pay the amount over again to the persons entitled in remainder whose title accrued within six years of the time of bringing the action.

Judgment of STREET, J., affirmed; BURTON, J.A., dissenting.

Osler, Q.C., and *H. S. Osler*, for the appellants.

J. K. Kerr, Q.C., for the respondent.

C. C. YORK.] [1ST MARCH, 1892.

JONES v. PAXTON.

Transcript of judgment—County Court—Division Court—Issue of execution—Return of nulla bona—"Proceeding"—52 V. c. 12, s. 24.

In an action against a sheriff for a false return to a writ of *fi. fa.* issued on a judgment entered in a County Court by the filing therein of a transcript of a judgment recovered in a Division Court, it was objected by the defendant that the transcript was a nullity because no execution against goods had ever been issued and returned *nulla bona* in that Division Court.

Held, that, under the statute and Rules now in force, the issue of execution and return of *nulla bona* in another Division Court, to which a transcript had previously been sent, was a sufficient foundation for the transcript to the County Court.

Burgess v. *Tully*, 24 C. P. 549, distinguished.

Held, also, that a transcript to a County Court is not a proceeding within the purview of s. 24 of 52 V. c. 12, providing that no further proceedings shall be had in a Division Court after a transcript to another Division Court without an order or affidavit.

Aylesworth, Q.C., and *Chapple*, for the appellant.

Farewell, Q.C., and *E. D. Armour*, Q.C., for the respondent.

HUTSON v. VALLIERS.

Mechanics' lien—County Court—Division Court—Enforcement in—R. S. O. c. 126, s. 28—Mortgage—Account—Cross-appeal—Notice of.

Section 28 of R. S. O. c. 128, which allows proceedings to recover the amount of a mechanic's lien, to be taken under certain circumstances in the County Court and Division Court, applies only to actions in which the party seeking to enforce his lien is suing in the ordinary way to obtain judgment and execution. Those Courts cannot entertain *an action* in the nature of an action of account by a lien-holder against a mortgagee who has sold the land in question under mortgage prior to the lien, though there may be wider powers by way of summary application.

In County Court cases notice of cross-appeal is not necessary.

Shepley, Q.C., for the appellants.

Masten, for the respondent.

C. C. Oxford.]

WHITE v. SAGE.

Fraud and misrepresentation—Deceit—Damage.

In order that a representation may be actionable, it must be fraudulently made. Where, therefore, in an action to recover

damages for falsely representing that a forged cheque was genuine, the jury answered in the negative the question, "Did the defendant falsely, fraudulently, and deceitfully represent the signature to the cheque to be genuine, when in truth and in fact it was a forgery?" the action was held not maintainable. hough in answer to other questions the jury found that the defendant made the representation without knowing whether it was true or false, without a reasonable belief in its truth, and without making proper inquiries.

Aylesworth, Q.C., for the appellant.

C. J. Holman, for the respondents.

C. C. LAMBTON.]

TOWNSHIP OF SOMBRA v. TOWNSHIP OF MOORE.

Ways—Negligence—Municipal corporations—R. S. O. c. 184, s. 531 (4).

Sub-section 4 of s. 531 of R. S. O. c. 184, which provides that if an action is brought against a municipal corporation to recover damages sustained by reason of any obstruction, excavation, or opening in a public highway, placed, made, left, or maintained by another corporation or by any person other than a servant or agent of the municipal corporation, the last mentioned corporation shall have a remedy over against the other corporation or person for any damages which the plaintiff in the action may recover against them, applies to the case of an obstruction, excavation, or opening, directly and immediately placed on or dug in the highway by the corporation or person against whom the remedy over is given. It does not give a right to one municipal corporation to recover from an adjoining municipal corporation damages recovered for an accident caused by non-repair of a road lying between the townships which they were jointly liable to keep in repair.

Shepley, Q.C., for the appellants.

Aylesworth, Q.C., for the respondents.

BABY v. ROSS.

Appeal to Court of Appeal— Order for committal of judgment debtor—R. S. O. c. 47, s. 42—County Court appeal—Certificate of Judge—Objection to security—Making away with property to defeat creditors—Direction to imprison debtor in gaol of any county where he may be found—Rule 932.

1. An appeal lies to the Court of Appeal from an order of the Judge of a County Court, in a County Court action, committing the defendant to gaol, upon his examination as a judgment debtor, for concealing or making away with his property in order to defeat or defraud his creditors. Such an order is in its nature final, and therefore comes within s-s. 2 of s. 42 of the County Courts Act, R. S. O. c. 47, as controlled by the proviso at the end of the section.

2. It is not a valid objection to an appeal that the Judge of the County Court has not, in certifying the proceedings, expressed in his certificate that they are certified "to the Court of Appeal."

3. The Court of Appeal will not entertain an objection to the security upon the appeal given in the County Court appealed from.

4. It appeared that the judgment debtor's wife had mortgaged her farm for the purpose of paying some of his debts; and that after the mortgage, instead of his continuing to work the farm for his own benefit, or on shares with his wife, as he had formerly done, he had agreed that until the mortgage was paid off he would work it for his wife alone.

Held, that this arrangement was not illegal nor unreasonable; and on no principle could it be said that it was a making away with property in order to defeat or defraud creditors.

5. The order directed that the defendant should be committed to the county gaol of L. *or any other county in which he might be found.*

Held, that this was wrong and not warranted by Rule 932; but it was not a ground for setting the order aside altogether.

Aylesworth, Q.C., for the appellant.

W. R. Meredith, Q.C., for the respondent.

C. C. WENTWORTH.]

OSLER v. MUTTER.

Execution—Exemptions—Insurance moneys—Receiver—R. S. O. c. 64.

A judgment creditor cannot obtain by a receiving order money payable to his debtor in respect of insurance upon exempted chattels. This money takes the place of the chattels and is subject to the same protection.

McBrayne, for the appellants.

W. Bell, for the respondent.

C. C. MIDDLESEX.] [8TH MARCH, 1892.

McGILL v. GRAND TRUNK R. W. CO.

Principal and agent — Corporations — Railways — Carriers — Contract — Damages.

Where it was sworn that the foreman of the freight department at one of the defendants' stations agreed to have certain trees forwarded to a station not on the defendants' line but on a connecting line:—

Held, that this was evidence to be submitted to a jury of a contract to that effect binding the defendants and that a non-suit was wrong.

The measure of damages against carriers for non-delivery of trees considered.

Judgment of the County Court of Middlesex reversed; HAGARTY, C.J.O., dissenting.

G. W. Marsh, for the appellants.

H. S. Osler, for the respondents.

C. C. ESSEX.] [OSLER, J.A., 20TH JANUARY, 1890.

In re ESSEX CENTRE MANUFACTURING COMPANY.

Company—Winding-up—Director—Illegal transaction—Summary application to set aside—R. S. O. c. 183, s. 23, s-s. 17.

Sub-section 17 of s. 23 of R. S. O. c. 188, which provides for summary proceedings in the course of winding up a company

against directors and other officers in respect of alleged misfeasance or breach of trust, is not wide enough to authorize the setting aside as a breach of trust, on the summary application of the liquidator, of a sale of lands by the company to a director especially where the lands have, at the director's request, been conveyed by the company to the director's wife.

S. H. Blake, Q.C., for the appellant.

Robinson, Q.C., for the respondent.

C. C. SIMCOE.] [10TH FEBRUARY, 1892

In re D. A. JONES COMPANY.

Company—Winding-up—Sale of assets by liquidator—Order of County Court approving—R. S. O. c. 183—Practice—Appeal—Final order.

The liquidator of a company, which was being voluntarily wound up under the Ontario Winding-up Act, sold the assets thereof *en bloc* to a private individual and then obtained from the County Court an order approving of the sale and making certain provisions for the disposition of the purchase moneys.

On appeal, it was

Held, that the order was made without authority and that it was a nullity.

Such an order is a "final order," as nothing further remains to be done under it, and, therefore, it is the subject of appeal.

Kilmer, for the appellant.

J. A. McCarthy, for the respondent.

1ST D. C., MIDDLESEX.] [13TH FEBRUARY, 1892.

BRITTON v. MILSON.

Bills of exchange and promissory notes—Presentment—Notice of dishonour—Waiver.

A statement by the indorser of a dishonoured note to the holder that he would see the maker about it, and his subsequent statement that he had seen the maker, who promised to pay as

soon as he could, with a request from the indorser not to "crowd the note," are not in themselves sufficient evidence of waiver of notice of dishonour.

What is sufficient evidence of such waiver discussed.

Rowell, for the appellant.

T. H. Purdom, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 1ST FEBRUARY, 1892.

ORMSBY v. JARVIS.

CHAPMAN v. JARVIS.

Bill of sale—Affidavit of bona fides—Statement of consideration—R. S. O. c. 125, s. 5—54 V. c. 20, not retrospective—Execution creditor contesting bill of sale—Previous assent—Estoppel.

The affidavit of *bona fides* accompanying a bill of sale stated that the sale was *bona fide* and for good consideration, namely, in consideration of $880 (which was the consideration expressed in the bill of sale) advanced by the bargainee by way of a loan. The evidence, given upon the trial of an interpleader issue between the bargainee and an execution creditor of the bargainors, showed that the real transaction was a sale and not a mortgage, and that the transfer of the goods covered by the bill of sale was made in satisfaction of a previous advance, and not as security for a present one. It was contended that the affidavit of *bona fides* was defective in not stating, as required by R. S. O. c. 125, s. 5, that the sale was *bona fide* and for good consideration, as set forth in the said conveyance.

Held, STREET, J., dissenting, that the affidavit substantially complied with the statute, and the addition of the words, "advanced by way of a loan," did not render the affidavit defective.

Per STREET, J.—The most obvious meaning of the words used in the affidavit is that, in consideration of a loan of $880, made by the bargainee to the bargainors, they were transferring to her the goods in question; and the plain inference is that the instrument is intended to operate as a mortgage and not as a sale. The instrument is not verified by the affidavit, but is instead rather qualified and rendered ambiguous by it, and the object of the Act in requiring the affidavit is not attained.

The bill of sale was given on the 17th March, 1891, and the Act 54 V. c. 20 was passed on the 4th May, 1891; s. 3 of which provided that nothing in this Act shall affect any action, etc., now pending, and every such action, etc., shall be adjudicated upon, and the said Act (R. S. O. c. 124) be construed as if this Act had not been passed.

Held, per ARMOUR, C.J., and FALCONBRIDGE, J., that the Act was not retrospective and did not apply to the bill of sale in question, and that no inference was to be drawn from s. 3 that the Legislature intended that the Act should be retrospective.

It was contended that the execution creditor was prevented from contesting the validity of the bill of sale, because A., who held the promissory note upon which the judgment was founded at the time the bill of sale was given, assented to its being given, his note being then overdue.

Held, per STREET, J., that, admitting A. to have, some days before the bill of sale was made, assented to the judgment debtors' transferring the goods, he did not thereby preclude himself from afterwards recovering judgment and seizing the goods before any transfer had in fact been made; and there was no transfer here, because the attempted transfer was void.

Watson, Q.C., for the plaintiffs.

J. M. Clark, for the defendant.

In re GOULD v. HOPE.

Prohibition—County Court—Interpleader order—Rule 1141 (a)—Sheriff—Money made under execution—Claim for exemption—Issue between execution creditor and execution debtor.

A sheriff seized and sold under an execution goods of the plaintiff which the latter claimed as exempt from seizure to the

extent of $100 as being implements of trade; and the plaintiff brought an action against the sheriff in a County Court to recover $100. While the action was pending and the sheriff still had the proceeds of sale in his hands, he applied to the Judge of the County Court for an interpleader order, which was made, directing an issue between the plaintiff and the execution creditors.

Held, on a motion by the execution creditors for prohibition, that, notwithstanding that the defendant was a sheriff and that the money in his hands was made by him as sheriff under execution, he was entitled to the benefit of Rule 1141 (*a*), if the facts before the Judge satisfied him that the case was within that Rule; and the Judge having jurisdiction and the interpleader order being a proceeding in the suit, the Court could not interfere.

Aylesworth, Q.C., for the sheriff.

H. Cassels, for the execution creditors.

C. J. Holman, for the plaintiff.

In re DUNLOP.

Liquor License Act—R. S. O. c. 194, s. 91—Construction of—Transfer of license—Certificate of electors—53 V. c. 56, s. 1—County Judge—Jurisdiction to revoke license.

Section 91 of the Liquor License Act, R. S. O. c. 194, is a penal enactment and is to be construed strictly; and, as it refers only to a "license issued" contrary to any of the provisions of the Act, and not to a "license transferred," and to the licensee and not to the transferee, a County Judge has no jurisdiction under it to entertain a complaint against a transferee that a license has been improperly transferred to him; and has no jurisdiction under it to revoke or cancel a license not already issued.

The applicant was, in the month of March, 1891, the holder of a wholesale license to sell liquor in premises in polling sub-division 10 in a city. The holder of a shop license in polling sub-division 18 transferred his license to the applicant on the 26th March, 1891. On the same day the license commissioners, on the petition of the applicant, not accompanied by a certificate signed by a majority of the electors in polling sub-division 10, consented in writing to the transfer of the shop license, and to its transfer to the premises in polling sub-division 10, and also cancelled the applicant's wholesale license.

Held, that the commissioners erred in consenting to the transfer of the shop license to the premises of the applicant in polling sub-division 10 without his petition therefor being accompanied by the certificate required by 53 V. c. 56, s. 1.

Du Vernet, for the applicant.

Langton, Q.C., for the commissioners.

HOLLINGER v. CANADIAN PACIFIC R. W. CO.

Railways and railway companies—Negligence—Accident at crossing—51 V. c. 29, s. 256—Ringing bell or sounding whistle—Other precautions—Unusual danger—51 V. c. 29, s. 260—Engine and tender, a "train of cars"—"Stop, look, and listen."

In an action against a railway company for negligence whereby the plaintiff was run over and injured by an engine and tender at a railway crossing where eight tracks crossed the road, and where trains were continually shunting:—

Held, that where the company are not able to comply with the terms of s. 256 of 51 V. c. 29 as to ringing a bell or sounding a whistle at least eighty rods from a crossing, because the engine starts to cross within that distance, some other kind of precaution should be taken to warn the public of danger; and where, as in this case, the crossing is unusually dangerous, it is incumbent upon them to use even greater and other precautions than those required by the statute.

Held, also, that an engine with a tender, moving reversely, is a "train of cars" within the meaning of s. 260, and some one should be stationed on the tender to warn persons crossing the track.

The rule "stop, look, and listen," as applied by the Pennsylvania State Courts to persons about to cross a railway track, is not in force here and is not one that should be adopted.

Elgin Meyers, for the plaintiff.

Wallace Nesbitt and *Angus MacMurchy*, for the defendants.

CHANCERY DIVISION.

[ROBERTSON, J., 17TH FEBRUARY, 1892.

ZIMMER v. GRAND TRUNK R. W. CO.

Railways and railway companies—Action for negligence—Limitation of actions—C. S. C. c. 66, s. 83—51 V. c. 29, s. 287.

Held, that s. 287 of the Railway Act, 1888, 51 V. c. 29 (D.), by implication repeals C. S. C. c. 66, s. 83, and, therefore, the plaintiff was not barred of his action for damages for negligence against the defendants, in respect to injuries sustained through disrepair of one of their bridges, by the lapse of six months since the accrual of the cause of action, but had one year within which to commence his action.

Rowe, for the plaintiff.

Wallace Nesbitt, for the defendants.

In re CAMERON, MASON v. CAMERON.

Insurance for benefit of wives and children—Apportionment by will—R. S. O. c. 136—53 V. c. 39, s. 6.

On 26th May, 1885, the testator insured in the Canadian Mutual Aid Association and received a certificate payable to his wife, if she survived him, if not to his children. On 6th October, 1887, he also insured in the Canadian Order of Foresters, and received a certificate payable to his wife and children.

On 12th August, 1891, he made his will bequeathing to his wife one half of his life policies for her life and widowhood, and after her decease, to be given to his surviving children in equal proportions.

Held, that R. S. O. c. 136, s. 6, the Act to secure to wives and children the benefit of life assurance, as amended by 51 V. c. 22, s. 3, and 53 V. c. 39, s. 6, applied to this case, and the wife was entitled to one-half of the sum payable under the certificate first mentioned for life, and the other moiety was untouched by the will, and went to her absolutely; while as to the second insurance the wife was entitled to one-half for life and widowhood by virtue of the will.

W. R. Riddell, for the plaintiffs.

J. Hoskin, Q.C., for the infant defendants.

Bain, Q.C., for the widow.

COMMON PLEAS DIVISION.

[THE JUSTICES IN BANC, 24TH DECEMBER, 1891.

REGINA v. CONNOLLY.

Criminal law—Preliminary hearing upon information before magistrate—Refusal to admit evidence—Mandamus.

At the preliminary hearing before a magistrate upon an information charging the defendants with conspiracy, evidence

given before a special committee of the House of Commons and taken down by stenographers was tendered by the Crown and refused.

Held, that the Court had no power to grant a mandamus to the magistrate directing him to receive such evidence.

Robinson, Q.C., *Osler*, Q.C., and *Hogg*, Q.C., for the Crown.

Lash, Q.C., and *A. Ferguson*, Q.C., for the defendants.

[9TH FEBRUARY, 1892.

REGINA v. STAPLETON.

Insurance—Accident—Fraternal societies—Insurance Act, R. S. C. c. 124, ss. 43, 49—Summary conviction.

The defendant, with the alleged object of establishing in the province of Ontario a branch of a society called the International Fraternal Alliance, having its head office in the United States, induced a number of persons to make application for membership therein and to pay a joining fee of $5, which, in addition to certain alleged social benefits, entitled a member, on application therefor and on payment of certain fees, to pecuniary benefits, namely, to a weekly payment in case of illness or accident and to certain sums in case of death or after a stated period. The defendant gave the applicants a receipt acknowledging the payment of the $5 for, as stated, the purposes mentioned in an agreement written thereunder, namely, to forward to the head office the application on signature thereof and, if declined, to return the amount paid; but, if accepted, the payer was constituted a member, entitled to the full benefits of all social advantages, and therefore might secure all the pecuniary benefits on application therefor.

Held, that the defendant was carrying on the business of accident insurance without having obtained the necessary license therefor, contrary to s. 49 of the Insurance Act, R. S. C. c. 124; and that no protection was afforded by s. 48, relating to fraternal and other societies, the scheme not being an insurance of the lives of the members exclusively; and the Court, therefore, refused a rule *nisi* to quash a summary conviction of the defendant for carrying on such business.

Lount, Q.C., for the defendant.

[27TH FEBRUARY, 1892.

REGINA v. SOUTHWICK.

Justice of the peace—Summary conviction under Liquor License Act—License commissioner taking part in the trial—Interest—Bias—Evidence of—Taking seat on platform—Provision for distress in conviction and not in adjudication—Sale to lodger during prohibited hours—R. S. O. c. 19, ss. 54, 58, 95.

At the summary trial of the defendant for an offence against the Liquor License Act, the bench at which the magistrate's sat consisted of a desk on a raised platform at the end of the Court-room, and on the platform, some four feet distant from the desk, was a chair for the use of the constable. During the trial a license comissioner, who was also a justice of the peace, went from the counsel's table, where he had been sitting, and sat in the constable's chair. There was no evidence that he in any way improperly interfered in the trial.

Held, that the license commissioner could not, under the circumstances, be deemed to have been sitting on the bench and and taking part in the trial contrary to s. 95 of the Act.

An objection that the adjudication did not provide for distress, while the conviction did, was overruled, following *Regina* v. *Hartley*, 20 O. R. 481.

Held, also, that ss. 54 and 58 of the Act do not authorize the sale of liquor to a lodger during prohibited hours; the most that can be said is that a sale to a lodger does not make him an offender.

Du Vernet, for the defendant.

Langton, Q.C., for the prosecutor.

REGINA v. ELBORNE.

Liquor License Act—Sale by druggist without recording in a book—Nature of offence—Evidence—R. S. O. c. 194, ss. 49, 50, 52, 88.

The defendant was summarily convicted for a breach of the Liquor License Act, R. S. O. c. 194, for that he "did unlawfully sell liquor without recording the same as required by the License Act."

Held, ROSE, J., dissenting, that the offence was similar to that of which the defendant had formerly been convicted; and that the judgment of this Court, *ante* p. 40, quashing the former conviction, governed the case.

Per ROSE, J.—In the former case the conviction was for a contravention of the general provisions of the Act contained in ss. 49 and 50; while the present conviction was for a breach of s. 52 itself, for a sale without recording, the penalty for which is provided by s. 88.

G. W. Meyer, for the defendant.

Langton, Q.C., for the prosecutor.

[THE DIVISIONAL COURT, 27TH FEBRUARY, 1892.

VANSICKLE v. BOYD.

Arrest— Order for—Motion to set aside—Action for breach of promise of marriage—Assent of plaintiff—Corroboration—Affidavit—Mistake in plaintiff's name—Nullity—Irregularity—Writ of summons—Indorsement of claim for lien on land—Statement in affidavit—Intent to defraud—Evidence of.

A motion by the defendant to set aside an order for his arrest, in the nature of a *ca. re.*, in an action for breach of promise of marriage, was based on the grounds, amongst others, that upon the application for the order no assent by the plaintiff to the defendant's alleged assent was shown, and that the evidence of the plaintiff upon the application was not corroborated.

Held, that these grounds were not supportable, as the affidavits sufficiently disclosed these matters.

The plaintiff's affidavit on which the order for arrest was headed in the proper style of cause and proceeded, "I, Alberta Jane Boyd, the above named plaintiff," her name being Alberta Jane Vansickle, and was signed "Berta J. Vansickle."

Held, that the affidavit was not a nullity; but the mistake therein was merely an irregularity, and the objection thereto should have been expressly taken in the notice of motion.

The writ of summons was indorsed with a claim for a lien on a named 200 acres of land in Ontario. The plaintiff in an affidavit filed in reply stated that, notwithstanding the indorsement, she had no knowledge of the defendant's owning any land.

Held, that this was no ground for setting aside the arrest.

The plaintiff in her affidavit on which the order for arrest was based stated that the defendant, taking advantage of their engagement, had seduced her, and, as soon as he discovered that she was with child, went to the United States, but subsequently returned to attend his father's funeral, and was then about to suit Canada with intent to defraud her, etc. The plaintiff's father also swore to the intent; while the defendant, though filing an affidavit, made no reference to his financial condition.

Held, that the alleged intent was sufficiently disclosed.

Furlong, for the defendant.

F. Fitzgerald, for the plaintiff.

In re SCOTTISH ONTARIO AND MANITOBA LAND CO.

Courts—Overholding tenants—R. S. O. c. 144, s. 6—Motion to review finding of County Judge—Proper forum.

A motion to a Divisional Court by way of appeal from an order of a Judge in Chambers dismissing a motion under s. 6 of the Overholding Tenants' Act, R. S. O. c. 144, to set aside the finding of a County Judge, was dismissed on the merits.

Held, that an application under s. 6 may, having regard to Rule 219, be properly made to a Divisional Court; and

Semble, it is the only Court in which it can be made.

E. B. Brown, for the tenant.

Langton, Q.C., for the landlords.

[ROSE, J., 27TH JANUARY, 1892.

In re McGILL AND LICENSE COMMISSIONERS OF BRANTFORD.

Liquor License Act, R. S. O. c. 194, ss. 4, 32, 54—Power of license commissioners to pass resolutions fixing hours for sale of liquor—Power of Court on summary application to quash resolutions.

License commissioners, appointed under R. S. O. c. 194, on the 17th April, 1891, passed a resolution provided that after 1st May following, in all places where intoxicating liquors are or may be sold by wholesale or retail, etc., no sale or disposal of the same shall take place therein between the hours of 12 p.m. and 5 a.m.; which resolution they afterwards amended by resolution substituting 11 p.m. for 12 p.m.

Held, that under s. 4, enabling the license commissioners to pass resolutions for regulating taverns and shops, there was power to pass the resolutions; and that such power was not interfered with by ss. 32 and 54, no by-laws on the subject having been passed by the municipality.

Quære, whether there is power on summary applications to quash such resolutions.

Daniels v. *Municipal Council of Burford*, 10 U. C. R. 478; *Cæsar* v. *Municipality of Cartwright*, 12 U. C. R. 341, commented on.

Du Vernet, for the applicant.

Wilkes, Q.C., for the commissioners.

IN CHAMBERS.

[MacMahon, J., 20th February, 1892.

BLACHFORD v. GREENE.

Discovery—Libel—Damages in way of trade—No allegation of special damage—Examination of plaintiffs—Disclosure as to diminution of profits—Particulars—Evidence.

In an action for damages for libelling the plaintiffs in the way of their trade, the plaintiffs did not allege special damage, but alleged generally that their business and commercial reputation had suffered. Upon the examination of the plaintiffs for discovery they refused to answer as to what business they had lost by reason of the alleged libels.

Held, that no evidence of special damage would be admissible at the trial, but that the plaintiffs would have the right to place figures before the jury to shew a general diminution of profits since the publication of the alleged libels; and if the plaintiffs proposed to give this class of evidence at the trial, the defendants were entitled on the examination for discovery to know how such diminution was made out and the figures by which it was proposed to support it, but not to seek information as to the loss of any particular custom; but if the plaintiffs did not propose to give such evidence, the defendants were not entitled to the discovery.

It was, therefore, ordered that the plaintiffs should give particulars of any damage intended to be claimed for diminution of profits; and if particulars given, that the examination should be continued and discovery afforded; but if particulars not given, that evidence of diminution of profits should not be given at the trial.

Bicknell, for the plaintiffs.

Kappele, for the defendants.

NEW BRUNSWICK.

In the Supreme Court.

IN CHAMBERS.

[PALMER, J., MARCH, 1892.

THE BANK OF NOVA SCOTIA v. McKINNON.

Corporations—Residence of—Where head office exists—Cannot change residence—53 V. c. 60 (N. B.)

This was a motion for a non-suit on review from the City Court of Moncton. The action was brought by the plaintiffs, a corporation created for banking by the legislature of Nova Scotia, having their head office at Halifax, in that Province, and a branch at the city of Moncton. The defendant did not reside in the city of Moncton, and the only question was whether the City Court had the jurisdiction which is given to it by 53 V. c. 60, s. 70 (N. B.), which enacts, "The jurisdiction of the Court in actions where the sum demanded exceeds the sum of twenty dollars shall be confined to causes in which the plaintiff

or defendant, or one of the plaintiffs or defendants, resides in the city of Moncton." The motion was made on the ground that the plaintiffs had no residence in the city of Moncton, against which it was urged that the plaintiffs had a branch office and did business in Moncton, and therefore had a residence sufficient to satisfy the Act.

Held, that this was not sufficient. The law on this subject in Canada may be stated thus. The corporation, in law, may be said to be born in the province where by law it is created and organized, and to reside where, by or under authority of its charter, its principal office is. A corporation, therefore, created by and organized by the laws of Nova Scotia and having its principal office there, is, under our constitution and laws, a resident of that province, possessing all the rights and having all the powers its charter confers, but limited to the confines of the province. It cannot migrate or change its residence without the consent, express or implied, of the legislature of its province, but it may transact business wherever its charter allows unless prohibited by local laws; it must dwell in the province of its creation and cannot migrate to any other sovereignty. It follows that the defendant's contention must be allowed and a non-suit entered, and the bank must pay the costs of review.

C. E. Simmonds, for the plaintiffs.

David Grant, for the defendant.

MANITOBA.

In the Queen's Bench.

[Full Court, 11th February, 1892.

PHILLIPS ELECTRICAL WORKS CO. v. ARMSTRONG.

Interpleader—Examination of judgment debtor at instance of claimant.

The plaintiffs obtained judgment and execution, under which the sheriff seized a dynamo subsequently claimed by the N. W.

Electric Company. The sheriff interpleaded, when the claimants filed an affidavit proving their claim, and obtained an order to examine one of the defendants under s. 46 of the C. L. P. Act, 1854, which provides that "upon the hearing of any motion or summons it shall be lawful for the Court or Judge . . . to order such witnesses as they or he may think necessary to appear, and be examined *viva voce*," etc.

The defendant attended before the examiner, but declined to be sworn, contending that the referee had no jurisdiction to make the order for his examination.

The claimants then applied to a Judge for an order to commit the defendant for contempt or to compel him to attend to be examined at his own expense.

TAYLOR, C.J., made an order for the defendant to attend to be examined, or in default to be committed. The defendant appealed.

Held, that s. 46 of the C. L. P. Act, 1854, was sufficiently wide to sanction the order appealed from. On the return of a sheriff's interpleader summons, the evidence of the judgment debtor may be taken if the Judge or referee see fit to direct it.

Appeal dismissed with costs.

Tupper, Q.C., and *Phippen*, for the defendant.

C. P. Wilson, for the claimant.

[TAYLOR, C.J., 15TH MARCH, 1892.

MACDONALD v. CUMINGS.

Attachment of debts—Garnishing creditor—Execution creditor—Priorities—Surplus goods sold at request of debtor—Goods in custodia legis—Sheriff.

Appeal from the judgment of a County Court upon an interpleader issue.

In December, 1890, the stock in trade of Cumings & Co. was seized by a bailiff under a landlord's warrant and held by him for taxes, rent, and gas charges. While so under seizure

an execution in a suit of Cumings v. Cumings was on 20th December placed in the hands of the sheriff, who seized and gave the landlord's bailiff a warrant to hold for him.

On 30th December the stock was sold at auction to one Wilson, and realized more than sufficient to pay the rent, taxes, and execution.

On 2nd January, 1891, Macdonald & Co. served on Wilson a garnishing order attaching $174, part of the surplus moneys; they subsequently obtained judgment.

On the morning of the 3rd January Turner & Co. recovered a judgment against Cumings & Co., and placed an execution against goods in the sheriff's hands. On the evening of the same day Wilson handed the sheriff a cheque for the amount due in Cumings v. Cumings.

Macdonald & Co. claiming to be paid, under their garnishing order, out of the surplus purchase money, and Turner & Co. claiming the whole of it under their execution, Wilson paid into Court $177, and an issue was directed to try whether Macdonald & Co. were entitled to $174.08, part of the money paid into Court by Wilson, as against Turner & Co.

The sale was conducted by the deputy sheriff at the request of the landlord's bailiff; as both the partners in Cumings & Co. did not want any goods left but wanted them all sold, they gave the sheriff an authority to sell all the stock, and he considered that the balance over what was sufficient to cover the claims was sold on behalf of Cumings & Co.

The County Court Judge entered a verdict for Turner & Co., and from that Macdonald & Co. appealed.

Held, that the deputy sheriff acted at the sale as the agent of the landlord's bailiff, not in his official character. When the writ in Cumings v. Cumings was placed in the sheriff's hands, and when he went to seize the goods they were in the custody of the law and could not be seized. He did not, as sheriff, sell the goods from which the surplus money was derived. The surplus, after paying the claims, was the property of Cumings & Co.; it was in Wilson's hands for them; and the garnishing order served on him on 2nd January bound the money in his hands. The property in the goods passed to Wilson at the time of the sale. A sheriff's sale is for ready money and immediate delivery.

Appeal allowed with costs. The verdict for Turner & Co. set aside and a verdict entered for Macdonald & Co.

Hough, for the plantiff.

Crawford, for the defendant.

[DUBUC, J., 7TH MARCH, 1892.

FRIESEN v. SMITH.

County Court—Jurisdiction—Unsettled account—Waiver of objection—Appeal.

Appeal from the County Court of the county of Manchester.

Judgment was given in favour of the plaintiff for $144.53. The first point raised was the question of jurisdiction. The County Court can investigate unsettled accounts up to $400; and $250 is the limit for which judgment can be given. The defendant contended that the claim of the plaintiff was allowed by the County Court Judge at $277.88, and that it was by deducting the amount allowed to the defendant on his set-off or counter-claim that the amount was reduced to $144.53, and he contended that the County Court could not be given jurisdiction by making such reduction.

The question of jurisdiction was first raised by the dispute note filed by the defendant, but when the case came on to be tried, the defendant allowed the trial to go on without any mention of the matter, and it was only after the case had been fully heard that objection to the jurisdiction was taken. The County Court Judge found that, by so doing, the objection was apparently waived, and the issue tried by consent.

Held, that the finding should be sustained and the appeal dismissed with costs.

Phippen, for the plaintiff.

C. H. Campbell, for the defendant.

[BAIN, J., 14TH MARCH, 1892.

CROTTY v. TAYLOR.

Mortgage—Sale by mortgagees under power of sale—Bill to restrain proceedings under covenant—Demurrer—Inability of mortgagees to reconvey.

The plaintiffs' bill alleged that one Hanover having mortgaged certain lands to the plaintiffs to secure a large sum of money, the defendant Taylor, who was the manager of the defendant company, the Ontario Investment Association, purchased this mortgage for the company, with the company's moneys, but took the assignment thereof in his own name; that by the assignment the plaintiffs covenanted with Taylor that the mortgage would be paid at maturity; and that, although the covenant was with Taylor, it was given and taken for the benefit of the company; that, default having been made in the payment of the mortgage, the company, in Taylor's name, recovered judgment against the plaintiffs on their covenant and issued execution, and that the same were in force against the plaintiffs, for the benefit of the company; that the company caused the lands to be offered for sale by auction under the power of sale in the mortgage, and caused them to be knocked down to one Patton as a pretended purchaser; that Taylor deeded the lands to Patton under the power of sale; that Patton conveyed to Murray, and Murray to McFie; that McFie having died, the lands became vested in his executor Meredith; that the company, having sold the lands to McBean, procured Meredith to convey to him, and received the purchase money for their own use and benefit; and that Taylor had assigned the judgment against the plaintiffs to the company, who were endeavouring to enforce payment. The bill asked for a decree declaring that Taylor and the company had no right to enforce the judgment and that they be restrained by the Court from further enforcing it.

The defendants demurred for want of equity.

Held, that by the sale to McBean the company had deprived themselves of all estate and interest in the lands and of the power to enable the plaintiffs to redeem. If a mortgagee, after getting in the equity of redemption, has so dealt with the land

as to render it impossible for him to restore it to the mortgagor on payment of the mortgage debt in full, the Court will prevent the mortgagee suing at law to recover the mortgage money. This principle, *i.e.*, that a mortgagee cannot sue the mortgagor on his covenant unless he has it in his power to give the estate back, is as applicable to cases in which, like the present, the mortgagee has effected the alienation of the estate under the power of sale, as it is to those in which he has put it out of his power to reconvey the estate after having got in the equity of redemption by foreclosure or by title paramount.

The defendants had put it out of their power to give the plaintiffs a re-assignment of the mortgage security; therefore they had the right to ask that the defendants be restrained from proceeding further to enforce the judgment.

Demurrer overruled with costs.

Howell, Q.C., and *Cumberland*, for the plaintiffs.

Ewart, Q.C., for the defendants.

Charles Farley Harris,
Library No. 185

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Divisional Court, 27th February, 1892.

ELLIS v. CLEMENS.

Waters and water-courses—Riparian proprietors—User of stream—Reasonable user—Injury to plaintiff's land—Prescriptive right—Malice—Damages—Concurrent cause of injury.

The use by riparian proprietors of the waters of streams through whose lands they flow must be a reasonable use, and the proprietors so using the waters must restore them to their natural channel before they reach the lands of the proprietors below them.

The wrongs complained of by the plaintiff were that the defendant, in restoring the water used by him to its natural channel, did so at such times and in such a manner that the water froze as it was being restored, and formed a solid mass of ice, completely filling the natural channel, so that the water coming down flowed away from the channel and over the plaintiff's land, and injured the land and the crops thereon; and the evidence showed that the cause of the water freezing as it was being restored to its natural channel was the times at which and the manner in which the defendant so restored it, and was the natural result thereof; and it appeared that the defendant was remonstrated with by the plaintiff and the effect of his so restoring the water pointed out to him and the injury it caused, but he persisted in so restoring it, and expressed his intention to continue to so restore it.

Held, that the defendant's user of the water was unreasonable; and, as there was no proof to sanction a prescriptive right to restore the water at such times and in such manner, to the injury of the plaintiff, that the defendant was liable to the plaintiff for the injury so caused; his conduct being wrongful, his persistence in it was malicious; and the injury to the plaintiff was an invasion of his rights, and imported damage, whether there was any actual damage or not.

Held, also, that even if there was a cause, for which the defendant was not responsible, concurrent with the wrongful acts complained of, and contributing to the injury sustained by the plaintiff, the defendant would still be answerable in damages for the injury sustained by the plaintiff by the wrongful acts complained of; but the plaintiff would only be entitled to recover such damages, or such portion thereof, as were caused by the wrongful acts complained of.

Judgment of STREET, J., 21 O. R. 227, affirmed.

W. R. Meredith, Q.C., and *E. P. Clement*, for the plaintiff.

Moss, Q.C., for the defendant.

GREEN v. MINNES.

Libel—Poster advertising account for sale—Justification.

The defendants M. & B., merchants, placed in the hands of the defendant A., a collector of debts, an account against the plaintiff Sarah G., wife of the plaintiff John G., for collection, well knowing the method of collection adopted by A., who, after a threatening letter to Sarah G., which did not evoke payment, caused to be posted up conspicuously in several parts of the city where the plaintiffs lived, a yellow poster advertising a number of accounts for sale, among them being one against "Mrs. J. Green (the plaintiff), Princess street, dry goods bill, $59.35." The evidence showed that Sarah G. owed the defendants M. & B. $24.33 only.

Held, that the publication was libellous and could only be justified by shewing its truth; and, as the defendants had failed to show that Sarah G. was indebted in the sum mentioned in the poster, they were liable in damages.

Aylesworth, Q.C., for the plaintiffs.

John McIntyre, Q.C., for the defendants.

McKELVIN v. CITY OF LONDON.

Damages—Remoteness—Action for negligence—Obstruction in highway—Remedy over—R. S. O. c. 184, s. 531, s-s. 4.

The plaintiff was driving a horse and sleigh along a highway belonging to a city corporation, when the runner of the sleigh came in contact with a large boulder, whereby both horse and sleigh were overturned. In endeavouring to raise his horse, the plaintiff sustained a bodily injury, on account of which he sued the corporation for damages, alleging that his injury was due to their negligence.

Held, that the damages were not too remote.

Page v. *Town of Bucksport*, 64 Maine 51; and *Stickney* v. *Town of Maidstone*, 30 Vermont 738, applied and followed.

Held, also, that the person who placed the boulder on the highway, and who had been added as a defendant under s. 531 of the Municipal Act, R. S. O. c. 184, was liable over to the corporation under s-s. 4.

Corporation of Vespra v. *Cook*, 26 C. P. 185, distinguished.

Balzer v. *Corporation of Gosfield South*, 17 O. R. 700, followed.

Hellmuth, for the plaintiff.

W. R. Meredith, Q.C., for the defendants the City of London.

Gibbons, Q.C., for the defendant Colwell.

DENISON v. MAITLAND.

Landlord and tenant—Action for arrears of rent and recovery of demised premises—Election to forfeit lease—Retraction of—Payment of rent and costs—Implied request to be relieved from forfeiture—R. S. O. c. 143, ss. 17-22—Vacant land—Evidence.

Rent under a lease made pursuant to the Short Forms Act becoming in arrear, the landlord served the statutory notice of forfeiture, and brought an action against the tenants both for the recovery of the demised premises and of the arrears of rent. Before the action came to trial the defendants paid the arrears and costs.

Held, that the bringing of the action was an election on the part of the landlord to forfeit the lease which could not be retracted by him; to enable him to get rid of the forfeiture, there must have been a request on the part of the tenants, either express or implied, to be relieved from the forfeiture; and the mere payment, after the forfeiture, of rent which accrued due before would not amount to such a request.

The effect of such a payment depends upon the intention of the party paying; and the payment of the rent and costs in this case could not operate, by force of R. S. O. c. 143, ss. 17-22, to permit the landlord to retract his forfeiture, without regard to the intention of the tenants, and without any request on their part to be relieved from the forfeiture.

These sections are applicable simply to an action for the recovery of the demised premises; had the action been brought for that alone, an implication might have arisen from the payment of rent and costs that the tenants intended to seek to be relieved from the forfeiture; but not so where the action was also brought for the rent in arrear, more especially as the demised premises were vacant land, the tenants not being in actual possession.

Held, also, on the evidence, that there was no intention on the part of the tenants to seek to be relieved from the forfeiture.

Held, further, that the landlord could not get rid of the forfeiture unless both tenants concurred in seeking relief from it.

Decision of BOYD, C., reversed.

W. H. Blake, for the plaintiff.

Allan Cassels, for the defendants.

VILLAGE OF NEW HAMBURG v. COUNTY OF WATERLOO.

Municipal corporations—Bridges—R. S. O. c. 184, ss. 532, 534—Counties and villages—Rivers and streams—Width of, how ascertained.

Upon the proper construction of ss. 532 and 534 of the Municipal Act, R. S. O. c. 184, the county council is by the former provision given exclusive jurisdiction over all bridges, by whomsoever built, crossing streams or rivers over 100 feet in width, within the limits of any incorporated village in the county, and connecting any main highway leading through the county; and is by the latter provision compellable to build such bridges only where necessary to connect any main public highway leading through the county.

Regina v. *Wellington*, 39 U. C. R. 194, not followed.

The place at which the width of a stream or river is to be ascertained is the place at which the bridge crosses; and the width is to be determined by the width of the natural channel of such stream or river, taking it in its highest *ordinary* state.

W. R. Meredith, Q.C., for the plaintiffs.

King, Q.C., for the defendants.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 29TH MARCH, 1892.

HASSON v. WOOD.

Negligence—Accident—Liability of hotel-keeper to guest—Trap-door.

The plaintiff went into the defendant's hotel on Sunday, as a customer. He had been there several times before. In passing through the building to go to the urinal, he fell through an open trap-door, which had been left unguarded, and received injuries.

Held, that he was entitled to damages from the defendant.

Per BOYD, C.—The plaintiff, being a customer of the defendant, came to the defendant's place of business for the demand and supply of that which was for the mutual advantage of the parties, and so is to be treated not as a mere licensee, but as being on the premises by the invitation of the proprietor. That invitation is different in its legal consequences as to safety while on the premises from the merely hospitable invitation which arises between host and guest.

Bigelow, Q.C., for the plaintiff.

J. G. Holmes, for the defendant.

MILLAR v. MACDONALD.

Judgment debtor—Unsatisfactory answers—Rule 932—Order refusing to commit—Appeal from—Party appearing in person—Costs.

An appeal lies to a Divisional Court from an order in Chambers refusing an application under Rule 932 to commit a judgment debtor for unsatisfactory answers; but, as the liberty of the subject is at stake, the appellate Court will not reverse the order unless the Judge below has erred in principle or is almost "overwhelmingly" wrong.

And under the circumstances of this case the Court refused to interfere.

Graham v. *Devlin*, 13 P. R. 415, approved and followed.

The judgment debtor appeared in person and argued his own case on appeal.

Held, that he should be allowed to set off against the judgment debt his disbursements and a moderate allowance for his time and trouble on the argument.

W. R. Smyth, for the plaintiff.

The defendant in person.

[BOYD, C., 25TH MARCH, 1892.

HARRISON v. HARRISON.

Partnership—Execution against individual partner—Sale of share.

Under an execution against an individual partner the sheriff can seize the partnership goods and sell the execution debtor's share, whatever may be the difficulties which arise thereafter; and the Judicature Act has made no difference in this respect.

W. R. Smyth, for the plaintiff.

[26TH MARCH, 1892.

SMITH v. SPEARS.

Mortgage—Power of sale—Sale by way of exchange.

Held, that a mortgagee with power of sale under the Short Forms Act can exercise such power by way of exchange for other land, instead of the usual way of sale for money. This is only doing *per obliquum*, what could be done *per directum*, and the words in the power of sale are "to sell and absolutely dispose of," which latter are appropriate to an exchange.

If a mortgagee is satisfied to take for payment of his debt the price of the land sold in money's worth or in other land, that is his own affair.

J. A. Macdonald, for the defendant.

F. A. Eddis, for the plaintiff.

[28TH MARCH, 1892.

In re CENTRAL BANK.

LYE'S CLAIM.

Company—Winding-up—Liquidators' commission—Allowance of commission on set-offs.

Held, that in fixing the liquidators' commission in winding-up proceedings of an insolvent bank, it is proper to take into consideration amounts adjusted or set off, but not actually received by the liquidators. And in this case a commission of two and a quarter per cent. having been allowed on the gross amount of moneys actually collected, a further commission of one and a quarter per cent. on a sum of $231,000, consisting of amounts adjusted or set-off, was allowed.

So far as possible the amounts allowed as compensation to liquidators in such winding-up proceedings should be evenly spread over the whole period of the liquidation, so as to ensure vigilance and expedition at all stages of the liquidation, as well as a proper distribution among the liquidators when more than one.

Osler, Q.C., and *A. C. Galt*, for the liquidators.

J. K. Kerr, Q.C., for the creditors.

[FERGUSON, J., 12TH MARCH, 1892.

In re SUN LITHOGRAPH CO.

Company—Winding-up—Claim that a conveyance is a fraudulent preference—Master in Ordinary—Jurisdiction.

In the course of winding-up proceedings under R. S. C. c. 129, an order was made by the Court under s. 77, s-s. 2, as amended by 52 V. c. 32, s. 20, referring all matters arising in the winding-up proceedings to the Master in Ordinary, and providing that he "do have (subject to appeal) as full and ample power as

under the said statute and amending Acts is conferred upon a Judge of the High Court." A claim being brought in before the Master for rent alleged to be due under a lease of certain buildings, a contention arose on behalf of the liquidator that the claimant was not and never had been the owner of the premises; that the conveyance to him, under which he claimed to be such owner, was really intended to secure him for certain moneys advanced, and was a fraudulent preference; and further, that the alleged lease was never executed.

Held, that the Master had no jurisdiction to entertain and adjudicate upon this contention, and the liquidator should be left to proceed under s. 31 of R. S. C. c. 129, by way of action.

Arnoldi, Q.C., for the claimant Farquhar.

Kilmer, for the liquidator.

IN CHAMBERS.

[BOYD, C., 26TH MARCH, 1892.

REGINA *ex rel.* CHICK v. SMITH.

Controverted municipal elections—Town councillor—Qualification—Alienation of leasehold—Quo warranto—51 V. c. 28, s. 9—Construction of statutes.

Where one was nominated as councillor for the town of Windsor, on 28th December, 1891, being at that time possessed of a sufficient leasehold qualification, the term of which, however, expired on 1st February, 1891, but before his election acquired another leasehold property of sufficient value :—

Held, that he was duly qualified under R. S. O. c. 184, s. 78, as amended by 51 V. c. 28, s. 9, since the cesser of the term of the first leasehold amounted to an alienation by operation of law, sufficient to come within the words of the statute.

Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of law, except in the case of necessity, or the absolute intractability of the language used.

Hoyles, Q.C., for the defendant.

H. S. Osler, for the relator.

DUNNET v. HARRIS.

Summary judgment—Rule 739—Leave to defend—Making defence appear—Payment into Court.

Where no defence has been made to appear upon a motion for judgment under Rule 739, the defendant will not be allowed to defend unconditionally.

In an action for the price of goods sold and delivered to a partnership, brought after the dissolution thereof, against the two members of the partnership, one of them set up as a defence upon a motion for judgment that upon the dissolution he retired and his co-partner agreed to continue the business and pay the debts, including that of the plaintiffs, and that the plaintiffs had taken securities from the co-partner after the dissolution and given him time, and so had relieved the other; but all those who knew of the dealings negatived any such course of dealing, and shewed that all that was done was with a reservation of rights against the retiring partner.

Held, that the latter could not succeed in the action unless the jury disbelieved all this evidence; and he should be allowed to defend only upon payment into Court of the amount claimed.

Akers, for the plaintiffs.

H. Cassels, for the defendant A. D. Harris.

DONAHUE v. JOHNSTON.

Discovery—Production of documents—Privilege—Letters.

Letters written by the defendant to a third person, who was a principal in the transactions out of which the action arose, and letters written by such third person to the defendant:—

Held, privileged from production in the action, where it appeared that they were written after the plaintiff had threatened litigation, and in consequence of the advice of the defendant's solicitor, in the endeavour on the part of the defendant to obtain information for the purposes of the threatened litigation.

Walter Read, for the plaintiff.

John MacGregor, for the defendant.

FINKLE v. LUTZ.

Laches—Nine years' delay in prosecuting action—Leave to proceed—Terms.

An action by solicitors to recover the amount of a bill of costs was begun and the defendant appeared in February, 1888. No further step was taken till February, 1892, when the plaintiffs delivered a statement of claim. The plaintiffs' reason for the delay was that the defendant had no means to pay during the period of delay.

Upon motion by the defendant to dismiss and cross-motion by the plaintiffs to validate the delivery of the statement of claim :—

Held, that the action should be allowed to proceed.

Terms imposed upon the plaintiffs.

H. S. Osler, for the plaintiffs.

R. O. McCulloch, for the defendant.

TAYLOR v. WOOD.

Infant—Next friend—Retirement of—Terms—Direction to solicitors not to proceed—Staying proceedings—Costs—Solicitors proceeding after warning—Indemnity.

Upon application therefor the next friend of an infant plaintiff may be allowed to withdraw, and the Court will upon such application impose such terms as the circumstances of the case and the welfare of the infant may require.

Solicitors began an action in the name of an infant as plaintiff by her mother as next friend, with the consent of the latter. After the action had been some time in progress, the mother wrote a letter to the solicitors revoking the authority to use her name. The solicitors answered that proceedings would not be stayed unless she paid costs up to date, and that if she did not

do so they would assume that she intended them to continue the action. She took no notice of this and they went on with some proceedings, whereupon the defendant, instructed by the mother, moved to dismiss the action on the ground that it was being prosecuted without authority, and asked for costs against the solicitors.

Held, that there was nothing to prevent the mother from renouncing her character of next friend; her direction to the solicitors not to proceed was to be treated very much as an application for leave to withdraw from the litigation; and had she made such an application, it would have been granted unconditionally, subject to her remaining amenable to the jurisdiction of the Court as to liability for costs theretofore incurred.

An order was made staying all proceedings in the name of the mother as next friend; thus leaving the action in abeyance, to be resumed if another next friend should offer, or to be continued when the plaintiff should attain majority.

As to costs:—

Held, that the Court reaches the solicitors of plaintiffs directly for the benefit of the defendant only where the plaintiff as client has a right to be recouped by the solicitor, and to the extent of that recoupment. The next friend in this case was liable to the solicitor for costs up to her letter, and the solicitor was liable to the next friend for costs subsequent thereto; and as the former costs exceeded the latter, and, as between the next friend and the defendant, the former was liable for costs so long as she did not make a direct application against the solicitors, no order could be made in favour of the defendant; but the next friend was entitled to be indemnified by the solicitors for costs incurred after her letter.

Held, also, that it was competent for the defendant to move to stay proceedings, although the normal practice is for the next friend to move.

Shilton, for the defendant.

Moss, Q.C., and *F. A. Anglin*, for the plaintiff's solicitors.

[FERGUSON, J., 19TH MARCH, 1892.

REGINA *ex rel.* MANGAN v. FLEMING.

Controverted municipal elections—Rule 1041—Notice of motion—Affidavits—Viva voce evidence—R. S. O. c. 184, s. 212—S. 188—Recognizance—Allowance of sureties—Appeal—Signatures to recognizance—Commissioner.

In a proceeding in the nature of *quo warranto* under the Municipal Act, it is necessary, upon the true construction of Rule 1041, for the relator to file the affidavits and material to be used in support of his motion before serving the notice of motion, even in a case where *viva voce* evidence is to be taken under s. 212 of R. S. O. c. 184; but the omission to file such affidavits and material does not constitute a good reason for setting aside the service of the notice of motion; the effect simply is that the relator cannot read affidavits or material not so filed in support of his motion; and mentioning an affidavit or other material in the notice of motion, when there is none such filed, does not vitiate the motion.

Where the Judge of a County Court has allowed the relator's recognizance and the sureties as sufficient, pursuant to s. 188 of R. S. O. c. 184, a Judge of the High Court cannot interfere upon an appeal.

There is no necessity for the signatures to the recognizance of the persons to be bound by it.

Although s. 188 directs that the recognizance shall be entered into before the Judge or a commissioner for taking affidavits, a recognizance appearing on its face to have been entered into before a commissioner for taking bail, is good; for all commissioners for taking bail are also commissioners for taking affidavits.

S. White, for the relator.

Aylesworth, Q.C., for the defendant.

[STREET, J., 31ST MARCH, 1892.

ERDMAN v. TOWN OF WALKERTON.

Evidence—Order for use of in future action—Bill to perpetuate testimony—Parties.

The Court has no power in a pending action to make an order authorizing the use of evidence taken therein, in a future action.

Bills to perpetuate testimony were maintainable, not by the parties to a pending action, but by persons possessing rights which could not be enforced at the time.

W. H. Blake, for the plaintiff.

Douglas Armour, for the defendants.

MACK v. DOBIE.

Discovery—Examination of party—Rule 487—Examination to credit—Identity of plaintiff.

The examination of a party for discovery in the cause under Rule 487 must be confined to matters which are relevant to the questions raised by the pleadings; but a fair amount of latitude is to be allowed.

Questions which go only to credit are not admissible.

In an action for a partnership account, where the defendant denied the partnership and set up that the plaintiff had been his servant, under the same name as that in which he brought the action, during the period of the alleged partnership:—

Held, that it was not material to the issue that the plaintiff bore another name at a previous time, and the defendant could not examine him as to the details of his past life, long prior to the alleged partnership.

G. W. Marsh, for the plaintiff.

M. G. Cameron, for the defendant.

[MEREDITH, J., 1ST APRIL, 1892.

HOGABOOM v. LUNT.

HOGABOOM v. McDONALD.

Notice of trial—Rule 654—"Next sitting of the Court"—Assizes—Chancery sittings.

The plaintiff gave notice of trial for the Toronto assizes, which were earlier than the Chancery sittings, and the defendants gave notice of trial for the Chancery sittings. The actions could properly have been tried at either. In consequence of the state of the assize docket, it seemed probable that the actions would really be sooner tried if set down for the Chancery sittings.

Held, that the assizes was, and the Chancery sittings was not, "the next sitting of the Court;" and the defendants were, therefore, not within their right, under Rule 654, in giving notice of trial for the latter.

W. R. Smyth, for the plaintiff.

W. H. Blake, for the defendants.

ROBINS v. THE EMPIRE PRINTING AND PUBLISHING COMPANY.

Evidence—Foreign commission—Application for—Material on—Good faith—Necessity for evidence—Expense—Delay—Admissions.

In an action for libel published in the defendants' newspaper, the plaintiff applied for the issue of a commission to take his own evidence and that of other witnesses in England, where he and they lived.

The plaintiff's affidavit stated only that the witnesses were material and necessary for him on the trial of the action, and that he was advised and verily believed that he could not safely proceed to trial without their evidence.

Held, sufficient to entitle the plaintiff *prima facie* to a commission.

Smith v. *Greey*, 10 P. R. 531, commented on.

Every application for a commission must be made in good faith, and the evidence sought to be obtained must be such as to warrant a reasonable belief that it may be material and necessary for the purposes of justice; but it is safer where any injustice to other parties, in the way of delay or expense or otherwise, can be provided against, to favour the granting rather than the refusing of the application.

The main considerations are a full and fair trial and the saving of expense.

Under the circumstances of this case the order for a commission to take the evidence of the plaintiff and his witnesses abroad was granted, upon the plaintiff securing the defendants for their costs of the execution of the commission and undertaking to speed the proceedings and not delay the trial.

It was contended by the defendants that the evidence expected from the witnesses was unnecessary by reason of implied admissions in the statement of defence.

Held, that it was for the defendants to make the evidence unquestionably unnecessary, either by amending their pleadings so as to expressly make the admissions or by undertaking to do so at the trial.

George Bell, for the plaintiff.

H. Cassels, for the defendants.

[6TH APRIL, 1892.

STRUTHERS v. GREEN.

Costs—Scale of—Action transferred from County Court to High Court—Rule 1219 (4)—54 V. c. 14.

The provisions of Rule 1219 are applicable to an action transferred from a County Court to the High Court by virtue of 54 V. c. 14; and the costs of the proceedings after the transfer should be taxed upon the lower scale where the case falls within s-s. (4) of the Rule, by reason of the plaintiff seeking equitable relief and the subject matter involved not exceeding $200.

Douglas Armour, for the plaintiff.

Rowell, for the defendants the Molsons Bank.

[MR. WINCHESTER, 26TH MARCH, 1892.

McGILL v. McDONELL.

Jury notice—Action to establish will, etc.—R. S. O. c. 44, s. 77—Notice of trial by defendant—Rule 654—Notice of motion for judgment.

An action for an injunction and to establish a will and for the construction of the will and an account is one that was peculiarly within the exclusive jurisdiction of the Court of Chancery prior to the Administration of Justice Act of 1873, and should, therefore, be tried without a jury, unless otherwise ordered, by virtue of s. 77 of the Judicature Act, R. S. O. c. 44; and a jury notice given in such an action will be struck out.

Re Lewis, Jackson v. *Scott*, 11 P. R. 107, followed.

Under Rule 654 the defendant has a right to give notice of trial for the next sittings of the Court, and, if such notice is regular, the plaintiff cannot interfere with such right by giving notice for a more distant sittings.

It is the duty of a defendant, setting a case down for trial, to give notice of trial to all the other parties; and if some of them have not appeared, and it is necessary to give them notice of motion for judgment, such notice should be for the same time and place as the notice of trial.

Masten, for the plaintiff.

Frank Denton, for the defendant Robinson.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 28TH MARCH, 1892.

CENTRAL ELECTRIC CO. v. SIMPSON.

Summary judgment—Application for—Plaintiffs a corporation—Sufficiency of affidavit.

The plaintiffs appealed from an order of the Referee dismissing a summons under s. 34 of the Queen's Bench Act, 1885, to strike out an appearance and sign final judgment.

The plaintiffs being a corporation, the affidavit in support of the summons was made by one of their officers. An objection was taken that the affidavit did not state in express terms that the deponent was a person who could swear positively to the debt or cause of action. The deponent stated he was treasurer of the company and had an accurate knowledge of the facts deposed to. He then went on to state that the defendants were justly and truly indebted to the plaintiffs in a certain sum of money, and gave the particulars. These agreed with the particulars indorsed on the writ served on the defendant.

Held, that if the affidavit is made by the plaintiff himself, all that need be sworn to is that "in his belief there is no defence to the action." If the affidavit is made by another person, it may be very proper that he should do more and speak to the amount, etc., sued for, so that the Court may judge whether he is a person who can properly make the affidavit. But it is only for that purpose that it seems to be necessary he should do so. Probably if the affidavit contained the positive statement that the deponent was a person who could swear positively to the debt or cause of action, it might not be required. Here the deponent showed, on the affidavit, sufficient to satisfy the Court that he was such a person, and so the affidavit must be held sufficient.

The appeal was allowed.

Patterson, for the plaintiffs.

Hough, for the defendants.

[31ST MARCH, 1892.

SMART v. MOIR.

Costs—Scale of—Interlocutory judgment for part of claim—Verdict of $77 in addition.

The plaintiff sued for money lent, wages, etc., claiming $2,977; the defendant claimed by way of set-off $1,562, and in his pleas expressly excepted $450, parcel of the plaintiff's claim, for which interlocutory judgment was signed.

At the trial a verdict was entered for the plaintiff, on the issues tried, for $77.

The Master taxed the costs according to the Queen's Bench scale.

The defendant appealed against his taxation, claiming that a verdict for only $77 having been entered the plaintiff could tax County Court costs only.

Held, that the Master was right in taxing the costs on the Queen's Bench scale.

Cassidy, for the plaintiff.

C. P. Wilson, for the defendant.

[KILLAM, J., 19TH MARCH, 1892.

LIVINGSTONE v. ROWAND.

Costs—Taxation of—Appeal—Power of Master to increase counsel fees—Costs of order for leave to reply and demur.

Appeal from a taxation of the costs of a demurrer.

Two objections were raised to the counsel fees: (1) that those for argument of the demurrer and for the argument before the full Court on appeal, were beyond the maximum amount which the Master was allowed by the Rules to tax; and (2) that the allowances were so excessive that even if the Master could make them a Judge should interfere.

By the tariff of February, 1875, the following fees are allowed:—

"Fee on argument on supporting or opposing rules on return of rules *nisi*, or argument of demurrer, special cases $10

NOTE.—To be increased at the discretion of the Master to a sum not to exceed $30

Fee with brief at trial..... $15

(To be increased by taxing officer, in his discretion, to a sum not exceeding $30 to senior counsel and $20 junior counsel, in actions of a special and important nature: *Provided that the Master shall have power to tax increased fees.* . . .)"

It appeared that when the Master took office he found that the practice followed by his predecessor was to apply the italicised proviso to all the previous counsel fees, and to allow on arguments of demurrers and rules *nisi* fees beyond the maximum fixed by the tariff; that he had himself for over ten years adopted the same interpretation; and that his course was approved by the late Chief Justice of the Province.

Held, that as the application of the proviso was somewhat ambiguous, the interpretation which was supported by such long practice and such high authority should not be interfered with.

Further, that it was too late to interfere with fées which were in the discretion of the Master. The Rules specially authorized a reference of such to a Judge during the progress of the taxation. If parties chose to allow the taxation to be closed without insisting upon such a reference, they should be taken as electing to be bound by the Master's ruling.

An objection was taken to the charges in respect of an application to reply and demur. By the order the costs of the application were made costs in the cause, and not dependent merely on the result of the demurrer.

Held, that the application was not necessary to enable the plaintiff to demur, and that these costs were not costs of the demurrer.

Darley, for the plaintiff.

Kennedy, Q.C., for the defendant.

[30TH MARCH, 1892.

RUTHERFORD v. WALLS.

Prohibition— County Court — Territorial jurisdiction —Judgment—Absence of merits.

Application for prohibition. The plaintiff brought this suit in the County Court of Selkirk. The defendant resided out of the jurisdiction and the cause of action also arose out of the jurisdiction of that Court.

The defendant did not raise the defence of want of jurisdiction by his dispute note, but he notified the plaintiff of it, and of his intention to apply for prohibition if the action were persisted in. Notwithstanding the notice the plaintiff allowed the action to proceed to judgment, and judgment was signed. There was no attempt to dispute the defendant's statements as to his place of residence, or the place where the note in question was made.

Held, that the rule should be made absolute with costs. There would not be any justification for refusing the prohibition, although no attempt had been made to show a meritorious defence, and there apparently was none.

O. H. Clark, for the plaintiff.

H. Vivian, for the defendant.

[BAIN, J., 5TH APRIL, 1892.

MACDONALD v. HARRISON.

Contract—Action by architect for commission—Cost of building more than amount contracted for—Basis of remuneration—Liability of members of building committee of church.

The defendants were the building committee of a congregation, and the plaintiff sued them on the common counts to recover $213, a balance which he claimed the defendants owed him for his services as architect in connection with the church the defendants had built.

The defendants pleaded never indebted and payment.

A contract was entered into between the plaintiff and the defendants, by which the plaintiff was to prepare plans and specifications for the church; it was a condition of the engagement that the church the plaintiff was to plan should not cost more than $7,000 or $7,500, at the outside, exclusive of the cost of the seating, but inclusive of the cost of the heating apparatus. Instead of the church costing under $7,500, it cost about $9,800 exclusive of the seating.

The plaintiff charged commission on $10,000. The plaintiff sent the defendants the plan and specifications for the foundation some three weeks before he sent them the remainder of the plans, and the foundation was built by the time the rest of the plans arrived, so the defendants were committed to the building; the plaintiff assured them that the church could be built for $7,500, and defendants proceeded with the work according to his plans. They continued to employ him after they knew that the cost would exceed $7,500. The plaintiff sued, not on the special contract, but on a *quantum meruit*. The congregation, for whom the committee acted, were not an incorporated body.

Held, that it was to the defendants personally that credit was given, and that if there had been a breach of the contract they were personally liable to the plaintiff.

The defendants having shown that the work had been done under a special contract by which the church was to cost not more than $7,500, they could not be held liable to pay the stipulated commission on more than that amount; as they did not know that the cost would exceed the $7,500 until after they had begun the construction of the church according to the plans and were committed to them, the fact that they had used the plans did not make them liable to pay commission on the cost over $7,500.

Verdict for the plaintiff for $46.25, after allowing for payments made on account.

Howell, Q.C., and *D. A. Macdonald*, for the plaintiff.

Cooper, for the defendants.

[11TH APRIL, 1892.

GIBBONS v. CHADWICK.

Prohibition—County Court—Want of jurisdiction—Service out of jurisdiction —Subsequent acquiescence in jurisdiction.

Application for a rule *nisi* for a writ of prohibition to the Judge of the County Court of the county of Selkirk.

The plaintiff issued a garnishing order and summons on 24th November, 1891, claiming from the defendant $36.17 for breach of contract. The defendant resided in Ontario, and the cause of action arose there, but on 27th November the County Court Judge made an order that the plaintiff should be at liberty to serve the defendant out of the jurisdiction. This order was obtained on an application of the plaintiff's attorney showing that the defendant had assets in Manitoba to the value of $200, and was granted on the view that s. 47 of the County Courts Act, 1887, had the effect of making s. 32 of the Administration of Justice Act, 1886, applicable to the County Courts.

Held, that this section seemed to deal, not with procedure or practice, but with principles of jurisdiction, and as the jurisdiction of the County Courts is defined by the Act, their jurisdiction cannot be extended by the application of a principle of procedure or practice in the Court of Queen's Bench, as if it were a "case not expressly provided for."

On 14th December the defendant applied to the County Court Judge to set aside the summons and service for want of jurisdiction, but the application was dismissed. The defendant's counsel attended the trial and, although he took exception to the jurisdiction, he cross-examined the plaintiff's witnesses. A verdict was given for the plaintiff and judgment was signed on 29th February.

On 3rd March the defendant obtained a summons from the County Court Judge calling on the plaintiff to show cause why the judgment should not be set aside and the defendant allowed in to defend the action, when the matter was enlarged for three

weeks to enable the defendant's attorney to file the defendant's affidavit on the merits. The writ of prohibition was moved for while this enlargement was pending.

Held, that the defendant having brought to the notice of the Court below the facts that showed it had no jurisdiction, he had not lost his right to move merely because he allowed the case to be tried and judgment to be signed, specially as on the trial he still took exception to the jurisdiction. But in the subsequent motion to set aside the judgment and to be allowed in to defend on the merits there was such a complete acquiescence in the jurisdiction, with full knowledge of all material facts, that the Court should decline to interpose. Considering the importance of making an end of litigation, and that the granting of the writ, though of right, is not of course, the application must be refused and the rule *nisi* discharged with costs.

Elliott, for the plaintiff.

Cameron, for the defendant.

Supreme Court of Canada.

ONTARIO.] [4TH APRIL, 1892.

McMILLAN v. BARTON.

Contract—Deed of land—Evidence—Agency—Statute of Frauds—Parol testimony.

M. owned certain property which was mortgaged and had been advertised for sale under a power of sale in the mortgage. Before the date fixed for the sale M. made an assignment for the benefit of his creditors and his wife tried to purchase the property. It was not sold on the day named, and the next day M.'s wife went to the solicitors of the mortgagee and arranged for the purchase by making a cash payment and giving a mortgage for the balance. She had some other property on which she wished to raise the money for the cash payment and B. offered to lend the amount at seven per cent. interest for a year, he taking the wife's property and holding it in trust for that time. B. and M. went to the office of the mortgagee's solicitors, where a contract was drawn up in the terms agreed and signed by B., who told the solicitors that he did not know whether the deed would be taken in his own name or his daughter's, but that he would advise him by telephone. On the following day a telephone message came to the solicitors to have the deed made in the name of B.'s daughter, which was done; the deed was executed, the money paid, and a mortgage was given to the original mortgagee, as agreed. Subsequently the daughter claimed that she purchased the property absolutely for her own benefit, and an action was brought by M.'s wife against B. and his daughter to have the daughter declared a trustee of the property subject to repayment of the loan from B., and for specific performance of the agreement with B., the action charging collusion and

conspiracy on the part of B. and his daughter to deprive the plaintiff of her property. The defendants pleaded the Statute of Frauds in addition to denying the alleged agreement.

Held, affirming the decision of the Court of Appeal and that of the trial Judge, STRONG, J., dissenting, that the evidence established the agreement by B. to lend the money and take the property in trust as security; that the daughter was aware of this agreement; and that the deeds executed having been made in pursuance thereof, the daughter must be held a trustee of the property, as B. would have been if the deed had been taken in his name.

Held, further, STRONG, J., dissenting, that the Statute of Frauds did not prevent the agreement being enforced notwithstanding it was not in writing.

Moss, Q.C., for the appellants.

Bain, Q.C., for the respondent.

McDONALD v. McDONALD.

Trusts and trustees—Title to land—Action against estate for debt of executor—Purchase by executor at sale under execution—Constructive trust—Statute of Limitations.

D. M. was one of the executors of his father's estate, and an action was brought against the estate on a note made by him, which his father, in his lifetime, had indorsed for his accommodation. Judgment was recovered in the action and an execution issued, under which land devised to A. M., a brother of D. M., was sold and purchased by D. M., who gave a mortgage to the judgment creditors. D. M. afterwards sold the land to another brother, W. M., who paid off the mortgage, and it having been offered for sale under execution issued on a judgment against W. M., it was again purchased by D. M. The original devisee of the land, A. M., took forcible possession, and D. M. brought an action to recover possession.

Held, STRONG, J., dissenting, affirming the decision of the Court of Appeal, 17 A. R. 192, and of the Chancery Divisional Court, that the land having been sold in the first instance for a debt of D. M., he became, when he purchased it at such sale, a constructive trustee for the devisee, and this trust continued when he purchased it the second time.

Held, further, that if D. M. was in a position to claim the benefit of the Statute of Limitations there was not sufficient evidence of possession to give him a title thereunder.

McCarthy, Q.C., and *Leitch*, Q.C., for the appellant.

Moss, Q.C., for the respondent.

WRIGHT v. BELL.

Will—Construction—Devise to children and their issue—Estate to be "equally" divided—Per stirpes or per capita—Statute of Limitations—Possession—Trustee.

T. B. by his will made provision for the support of his wife and unmarried daughters, and then directed as follows: "When my beloved wife shall have departed this life, and my daughters shall have married or departed this life, I direct and require my trustees and executors to convert the whole of my estate into money to the best advantage by sale thereof and to divide the same equally among those of my said sons and daughters who may then be living, and the children of those of my said sons and daughters who may have departed this life previous thereto." The testator's wife and unmarried daughters having died, and some of his sons having previously died, leaving children, proceedings were taken to have the intention of the testator under the above clause ascertained.

Held, reversing the judgment of the Court of Appeal, 18 A. R. 25, and restoring that of the trial Judge, RITCHIE, C.J., dissenting, that the distribution should be *per capita* and not *per stirpes*.

J. B., a son of the testator and one of the executors and trustees named in the will, was a minor when the testator died, and after coming of age he did not apply for probate, though leave was reserved for him to do so. He did not disclaim, however, and he knew of the will. With the consent of the acting trustee, he went into possession of a farm belonging to the estate some time after he had attained his majority and remained in possession for over twenty years, when the period of distribution under the clause above set out arrived, and he then claimed to have acquired a title under the Statute of Limitations.

Held, affirming the decision of the Court of Appeal, that, as he held by an express trust under the terms of the will, the rights of the other devisees could not be barred by the statute.

S. H. Blake, Q.C., for the appellants.

McCarthy, Q.C., and *H. S. Osler*, for the respondents.

SIBBALD v. GRAND TRUNK R. W. CO.

TREMAYNE v. GRAND TRUNK R. W. CO.

Railway company—Negligence—Accident at crossing—Construction of road—Interference with highway—Neglect to ring bell.

The Midland Railway Company, in building a portion of its road, left at a crossing the road bed some feet below the level of the highway, and operated it without erecting a fence or otherwise guarding against accident at such crossing. The road was afterwards operated by the defendants, and S. was driving along the road one day and as he approached the crossing an engine and tender came towards him on the track; the horses became frightened and broke away from the coachman, who had jumped out to hold them, wheeled round, and the waggon rolled over the edge of the highway on to the track in front of the train. S. lost his arm, and a woman who had been in the carriage with him was killed. In actions by S. and the administrators of the deceased woman, the jury found that the bell had not been rung as required by the statute and that the defendants were guilty of negligence thereby, and also in not fencing or otherwise protecting the dangerous part of the highway.

Held, affirming the decision of the Court of Appeal, 18 A. R. 184, and of the Chancery Divisional Court, 19 O. R. 164, that the Midland Railway Company had no authority to construct the road as they did, unless upon the express condition that the highway should be restored so as not to impair its usefulness, and it or any other company operating the road was liable for injury resulting from the dangerous condition of the highway to persons lawfully using it.

Held, further, that the bell not having been rung as the statute required, the company was liable for injuries caused by the horses taking fright and overturning the waggon so that the occupants were thrown on to the track, though the engine and the waggon did not come in contact.

Grand Trunk R. W. Co. v. *Rosenberger*, 9 S. C. R. 311, followed.

McCarthy, Q.C., for the appellants.

S. W. Burns, for the respondents.

In re NORTH PERTH DOMINION ELECTION. CAMPBELL v. GRIEVE.

Dominion Controverted Elections Act—Appeal—Evidence—Reversal—Loan for travelling expenses—Proof of corrupt intent—40 V. c. 3, ss. 88, 91; s. 84 (a), (e), s. 131—Executory contract—Free railway ticket.

G., a voter and supporter of the respondent, holding a free railway ticket to go to Listowel to vote and wanting $2 for his expenses while away from home, asked for the loan of the money from W., a bar-tender and a friend. W., not having the money at the time, applied to S., an agent of the respondent, who was present in the room, for the money, telling him he wanted it to lend to G. to enable him to go to Listowel to vote. S., the agent, lent the money to W., who handed it over to G., and W. returned the $2 to S. the day before the trial. The Judges at the trial held that it was a *bona fide* loan by S. to W. On appeal to the Supreme Court of Canada :—

Held, reversing the judgment of the trial Judges, that, as the decision of the Court below depended on the inferences drawn from the evidence, their decision could be reversed in appeal, and that the proper inference to be drawn from the undisputed facts in the present case was that the loan by S. to W. was a mere colourable transaction by S. to pay the travelling expenses of G., and so within the provisions of s. 88 of the Dominion Elections Act and a corrupt practice sufficient to avoid the election under s. 91.

STRONG, J., dissenting, was of opinion that there was no evidence that the loan of $2 was made to G. with the corrupt intent of inducing him to vote for the respondent.

PATTERSON, J., dissented on the ground that, as the decision of the Court below depended on the credibility of the witnesses, it ought not to be interfered with.

Held, also, *per* STRONG and PATTERSON, JJ., affirming the judgment of the Court below, that upon the evidence the G. T. Railway tickets issued at Toronto and Stratford for the transportation of voters by rail to the polls in this case, were free tickets, and that as the free tickets had been given to voters who were well known supporters of the respondent prepared to vote for him and for him alone if they voted at all, it did not amount to paying the travelling expenses of voters within the meaning of s. 88 of the Dominion Elections Act.

Berthier Election Case, 2 S. C. R. 102, followed.

Per STRONG, J., that the tickets issued by the G. T. Railway Co., having been furnished with notice that they were to be used as they were in fact, the price thereof could not have been recovered at law: s. 131, Dominion Elections Act.

Osler, Q.C., and *A. Ferguson*, Q.C., for the appellant.

Garrow, Q.C., for the respondent.

In re WELLAND DOMINION ELECTION.

ROTHERY v. GERMAN.

Controverted elections—Promise by candidate to procure employment for voter—Evidence—Corroboration—Finding of the trial Judges—Appeal.

On a charge by the petitioner that the appellant had been guilty personally of a corrupt practice by promising a voter, W., to endeavour to procure him a situation in order to induce him to vote, and that such promise was subsequently carried into effect, the trial Judges held on the evidence that the charge had been proved.

The promise was charged as having been made in the township of Thorold on the 28th February, 1891. The evidence of W., who some time before the trial made a declaration upon which the charge was based at the instance of the solicitor for the petitioner, and had got for such declaration employment in Montreal from the C. P. R. Co. until the trial took place, was principally relied on in support of the charge, and the promise was found by the Court to have been made on the 17th February. Moreover G., the appellant, although denying the charge, admitted in his examination that he intimated to the voter that he would assist him, and there was evidence that, after the election, he wrote to W. and procured him the situation, but the letter was not put in evidence, having been destroyed by W. at the request of the appellant.

Held, affirming the judgment of the Court below, that the evidence of W. being in part corroborated by the evidence of the appellant, the conclusion arrived at by the trial Judges was not wrong, still less so entirely erroneous as to justify this Court as an appellate tribunal, in reversing the decision of the Court below on the questions of fact involved.

W. Cassels, Q.C., for the appellant.

G. T. Blackstock, for the respondent.

QUEBEC.]

BLACHFORD v. McBAIN.

Courts—Lessor and lessee—Amount claimed—Arts. 887, 888, C. P. C.—Jurisdiction of Circuit Court.

Held, affirming the judgment of the Court below, that where in an action brought by the lessor under Arts. 887 and 888, C. P. C., to recover possession of the premises, a demand of $46 is joined for the value and occupation since the expiration of the lease, such action must be brought in the Circuit Court, the amount claimed being under $100; FOURNIER, J., dissenting.

Duclos, for the appellant.

Archibald, Q.C., for the respondent.

BELL TELEPHONE CO. v. CITY OF QUEBEC.

QUEBEC GAS CO. v. CITY OF QUEBEC.

Appeal—Action to set aside municipal by-law—Supreme and Exchequer Courts Act, s. 24 (g).

In virtue of a by-law passed at a meeting of the council of the corporation of the city of Quebec, in the absence of the mayor, but presided over by a councillor elected to the chair in the absence of the mayor, an annual tax of $800 was imposed on the Bell Telephone Company of Canada, the appellants, and a tax of $1,000 on the Quebec Gas Company. In actions instituted by the appellants for the purpose of annulling the by-law, the Court of Queen's Bench for Lower Canada (appeal side) reversed the judgment of the Superior Court and dismissed the actions, holding the tax valid.

On appeal to the Supreme Court of Canada:—

Held, that the cases were not appealable, the appellants not having taken out or been refused, after argument, a rule or order quashing the by-law in question, within the terms of s. 24 (*g*) of the Supreme and Exchequer Courts Act, providing for appeals in cases of municipal by-laws.

Varennes v. *Vercheres*, 19 S. C. R. 365; *Sherbrooke* v. *McManamy*, 18 S. C. R. 594, followed.

The appeals were quashed without costs.

Irvine, Q.C., and *A. Ferguson*, Q.C., for the appellants.

P. Pelletier, Q.C., for the respondents.

ACCIDENT INSURANCE CO. OF NORTH AMERICA v. YOUNG.

Accident insurance—Immediate notice of death—Waiver—External injuries producing erysipelas—Proximate or sole cause of death.

An accident policy issued by the appellants was payable in case, *inter alia*, the bodily injuries alone should have occasioned death within ninety days from the happening thereof; and provided that "the insurance should not extend to hernia, etc., nor to any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease, existing prior or subsequent to the date of this contract, or by the taking of poison, or by any surgical operation or medical or mechanical treatment, nor to any case except where the injury aforesaid is the proximate or sole cause of the disability or death."

The policy also provided that "in the event of any accident or injury for which claim may be made under this policy, immediate notice must be given in writing, addressed to the manager of this company at Montreal, stating full name, occupation, and address of the insured, with full particulars of the accident and injury; and failure to give such immediate written notice shall invalidate all claims under this policy."

On the 21st March, 1886, the insured was accidentally wounded in the leg by falling from a verandah and within four or five days the wound, which appeared at first to be a slight one, was complicated by erysipelas, from which death ensued on the 18th of April following. The local agent of the company at Simcoe, Ontario, received a written notice of the accident some days before

the death, but the notice of the accident and death was only sent to the company on the 29th April, and the notice was only received at Montreal on the 1st of May. The manager of the company acknowledged receipts of proofs of death, which were subsequently sent, without complaining of want of notice, and ultimately declined to pay the claim on the ground that the death was caused by disease and therefore the company could not recognize their liability. At the trial there was some conflicting evidence as to whether the erysipelas resulted solely from the wound, but the Court found on the facts that the erysipelas followed as a direct result from the external injury.

On appeal to the Supreme Court:—

Held, reversing the judgment of the Court below, FOURNIER and PATTERSON, JJ., dissenting, that the company had not received sufficient notice of the death to satisfy the requirements of the policy, and that by declining to pay the claim on other grounds there had been no waiver of any objection which they had a right to urge in this respect.

Per FOURNIER and PATTERSON, JJ., affirming the judgment of the Court below, that the external injury was the proximate or sole cause of death within the meaning of the policy.

Geoffrion, Q.C., and *Cross*, for the appellants.

Lafleur, for the respondent.

NOVA SCOTIA.]

MILLER v. DUGGAN.

Registry laws—R. S. N. S., 5th ser., c. 84, s. 21—Registered judgment—Priority—Mortgage—Rectification of mistake.

By R. S. N. S., 5th ser., c. 84, s. 21, it is provided that "a judgment duly recovered and docketed shall bind the lands of the party against whom the judgment shall have passed, from and after the registry thereof in the county or district wherein the lands are situate, as effectually as a mortgage, whether such

lands shall have been acquired before or after the registering of such judgment; and deeds or mortgages of such lands, duly executed but not registered, shall be void against the judgment creditor who shall first register his judgment."

D. had agreed to mortgage certain properties, one of which had been conveyed to her late husband, through whom she claimed, by four different deeds, three conveying a one-sixth interest each, and the fourth a half interest. The conveyancer who prepared the mortgage had before him one of the deeds conveying a one-sixth interest, and by mistake and inadvertence that interest, instead of the whole, was described and conveyed. On 3rd December, 1887, the property mortgaged was sold under foreclosure and conveyed by the sheriff to M. On the 27th September, 1887, a judgment was recovered and registered against D., and in July, 1889, an execution was issued on that judgment, under which the sheriff attempted to levy on the five-sixths of the property of D. which should have been included in the mortgage.

In an action to have the mortgage rectified and the judgment creditor restrained from levying upon and selling the said property:—

Held, affirming the judgment of the Supreme Court of Nova Scotia, STRONG and PATTERSON, JJ., dissenting, that the parol agreement by D. to give a mortgage of the five-sixths parts of the said property was void against the registered judgment, and the action could not be maintained.

Grindley v. *Blaikie*, 19 N. S. Reps. 27, approved and followed.

Borden, Q.C., for the appellants.

Ross, Q.C., for the respondents.

EXCHEQUER.]

REGINA v. MARTIN.

Negligence of servant of Crown—Liability of Crown—50 & 51 V. c. 16—Prescription—Arts. 2262, 2267, 2188, 2211, C. C.

Held, reversing the judgment of the Exchequer Court of Canada, that even assuming that 50 & 51 V. c. 16 gives an action against the Crown for an injury to the person received on a public work, resulting from negligence of which its officer or servant is guilty, upon which point the Court expressed no

opinion, such Act is not retroactive in its effect, and cannot be relied on for injuries received prior to the passing thereof.

Held, also, that even assuming that under the common law of the Province of Quebec, or statutes in force at the time of the injury received, the Crown could be held liable, the injury complained of having been received more than a year before the filing of the petition, the right of action was prescribed.

Robinson, Q.C., and *A. Ferguson*, Q.C., for the appellant.

Belcourt and *Tache*, for the respondent.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 27TH FEBRUARY, 1892.

McGEACHIE v. NORTH AMERICAN LIFE ASSURANCE COMPANY.

Insurance—Life—Premium note—Non-payment of—Forfeiture—Election—Conditions of policy—Conduct of defendants—Evidence.

The defendants insured the life of the plaintiff's husband and issued a policy to him, taking his promissory note for the amount of the first year's premium. The note was several times renewed, and at the death of the insured, which took place within the first year, one of the renewals was overdue and unpaid. During the currency of one of the renewal notes the insured wrote to the defendants asking them what they would let him off with by cancelling the policy, and they answered him that his request that they should cancel the policy was unreasonable. On the day before the death of the insured the defendants wrote

to him that they had expected to hear from him with a remittance, and asked him to kindly give the matter his immediate attention. After the death the amount of the note and interest was tendered to the defendants, but they refused to accept it. In the application for the insurance, which was made part of the contract, it was provided that if a note should be given for a premium and should not be paid at maturity, the insurance or policy should thereupon become null and void, but the note must nevertheless be paid; and indorsed on the policy was a provision that if any premium note should not be paid when due, the policy should be void and all payments made upon it forfeited to the defendants.

Held, that the policy was voidable upon default being made in the payment of the premium note, but only at the election of the defendants; that, upon the evidence, the defendants had elected not to forfeit it but to continue it, and had treated it as subsisting up to the time of the death; that the policy was in force at the time of the death; and no subsequent act of the defendants could affect the plaintiff's claim.

Held, also, upon the evidence, that it could not be said that the defendants were at any time electing to forfeit the policy and nevertheless insisting upon the payment of the note, as they might have done under the provision in the application above mentioned.

Aylesworth, Q.C., for the plaintiff.

William Macdonald, for the defendants.

ROSS v. EDWARDS.

Staying proceedings—Vexatious action—Abuse of process of Court.

H. & Bro., being the owners of certain lumber in the hands of the defendants as warehousemen, sold it to L., who gave his promissory note for the purchase money, and pledged the lumber to the plaintiff's testator for an advance of money, and the defendants agreed to hold it to the order of the testator. L. having become insolvent, H. & Bro. notified the defendants not to deliver the lumber to L. or to the testator, and the testator demanded the delivery of the lumber to him. The defendants

then interpleaded, and an order was made, upon the consent of the testator, directing a sale of the lumber and payment of the proceeds into Court, and the trial of an issue between the testator and H. & Bro. to determine which of them was entitled to the lumber or the proceeds thereof. That issue was determined in favour of H. & Co. The plaintiff then brought this action for conversion of the lumber, the alleged conversion being the non-delivery by the defendants to the testator of the lumber which they agreed to hold to the order of the testator.

Held, that this action was vexatious and an abuse of the process of the Court; and an order was made staying it with costs.

A. Ferguson, Q.C., and *W. M. Douglas*, for the plaintiff.

Robinson, Q.C., and *Shepley*, Q.C., for the defendants.

TOLTON v. CANADIAN PACIFIC R. W. CO.

Watercourse—Diversion of, by railway company—Equitable easement—Bona fide purchaser for value—Registered deed—Actual notice—Prescriptive right—Damages—51 V. c. 29, s. 90, s-s. h (D.)—Compensation.

Where the defendants in 1871, without authority, diverted a watercourse on certain land, and afterwards made compensation therefor to the owner of the land, the plaintiff's predecessor in title:—

Held, that the equitable easement thereby created in favour of the defendants was not valid against the registered deed of the plaintiff, a *bona fide* purchaser for value without actual notice, the defendants having shown no prescriptive right to divert the watercourse; and the diversion was wrongful as against the plaintiff.

Knapp v. *Great Western R. W. Co.*, 6 C. P. 187; *L'Esperance* v. *Great Western R. W. Co.*, 14 U. C. R. 173; *Wallace* v. *Grand Trunk R. W. Co.*, 16 U. C. R. 551; and *Partridge* v. *Great Western R. W. Co.*, 8 C. P. 97, distinguished.

The plaintiff, having failed to prove actual damages, was allowed nominal damages for the wrong; and instead of granting a mandatory injunction to compel the restoration of the watercourse, the Court directed a reference to ascertain the compensation to which the plaintiff would be entitled as upon an authorized diversion of the watercourse under 51 V. c. 29, s. 90, s-s. h, (D).

Elgin Meyers, for the plaintiff.

G. T. Blackstock and *Angus MacMurchy*, for the defendants.

LANE v. DUNGANNON AGRICULTURAL ASSOCIATION.

Equitable assignment—Order for payment of money—Evidence of intention.

One who had contracted to erect a building for the defendants, during its progress gave to various persons orders upon the defendants for sums due them by him, in the following form: "Dungannon, Sept. 12, 1890. To the Directors of the Dungannon Driving Park Association. Please pay to D. M. the sum of $——, and oblige. (Sgd.) T. F. H., contractor."

Held, per STREET, J., that these orders were not in themselves good equitable assignments of portions of the fund in the hands of the defendants.

Hall v. *Prittie*, 17 A. R. 306, followed.

The evidence, however, shewed that there was only one fund out of which the directors could be expected to pay the orders; that the nature of that fund and its origin were well known to all parties; that when the contractor promised the persons with whom he dealt orders upon the directors, he meant to give, and those persons expected to get, orders which were to be paid out of the contract price; and that the directors understood the orders as intended to deal with portions of the contract price and to be payable only out of that particular fund.

Held, per STREET, J., that the Court should look to the real intention of all the parties to the transaction and give effect to it by declaring that the contractor did make an equitable assignment to each of the order-holders of a portion of the fund.

ARMOUR, C.J., agreed in the result, but on different grounds.

Hoyles, Q.C., for the plaintiff.

Garrow, Q.C., for the order-holders.

W. H. Blake, for other creditors.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 29TH MARCH, 1892.

BRYCE v. KINNEE.

Sheriff's interpleader—Form of issue—Jus tertii—Rejection of evidence—Amendment—New trial.

An interpleader issue as to goods seized by a sheriff was directed to be tried between the claimants, as plaintiffs, and the execution creditor, as defendant. The form of the issue was whether the goods at date of seizure were the property of the claimants as against the execution creditor. The claimants' contention was that the goods were not owned by or in possession of the execution debtor at all, but in possession of his wife, and if they were not actually owned by the claimants themselves, that they were owned by the wife, and that there was between her and them a bargain such as to give them an equitable right to the goods. The trial Judge ruled that, under the form of the issue, the claimants could not give evidence to show that the property was in the debtor's wife.

Held, that the ruling was too strict; that the claimants should not be shut out from adducing in evidence the whole facts about the transaction; and that the issue should be amended so as to let in the question of the *jus tertii* for the benefit of the claimants, and their privity therewith, and also the claim of the wife; and that there should be a new trial.

Per BOYD, C.—Not the form of the issue, but the substance is to be looked at. It is competent for the claimant to show any facts warranting him in interfering with the process of execution, even if the property in the goods be in another; provided that this will not work a surprise upon the execution creditor, and that the claimant appears to be in privity with or claiming under the real owner.

Per FERGUSON, J.—The reasoning of some of the cases that the claimant, having caused the issue by asserting his right to the goods, ought not to be allowed to set up a case shewing that the goods belong to a third person, who has not interfered in the matter at all, can only apply to a case in which the claimant does not profess to claim title under the third person.

Aylesworth, Q.C., for the plaintiffs.

Shepley, Q.C., for the defendant.

FORWOOD v. THE CITY OF TORONTO.

Negligence—Accident—Street railway—Driving over man in daylight—Neglecting to stop a car—Contributory negligence.

The plaintiff, having hailed a westward bound tramway car, crossed over from the south side of the street to get into it; the eastward bound car was coming along at a fast trot, but was some hundred feet away to the west. The plaintiff was somewhat intoxicated. While he had hold of the westward bound car to board it, the eastward bound car ran over his foot which was on the rail. It was broad daylight. The jury found a verdict for the defendants.

Held, that there must be a new trial.

Although it might be said that the plaintiff did not by direct evidence shew any specific act or omission on the part of those in charge of the eastward bound car on which to rest his action, yet the happening of the accident and the attendant or surrounding circumstances were sufficient to raise the presumption that there was negligence on the part of those in charge of that car, the consequence of which was the happening of the accident. There was reasonable evidence, in the absence of any explanation by the defendants, that the accident arose from want of care on their part. Assuming that the plaintiff was guilty of some negligence himself, the defendants did not prove that his negligence was such that the accident could not have been avoided by due diligence on their part, that is, they did not prove that his negligence was the *proximate* cause of the accident, and therefore did not establish their defence of contributory negligence.

Per ROBERTSON, J.—Another ground for a new trial was the injustice done in this case, by counsel for the defendants appealing to the jury on the ground that, as they were ratepayers, they would be giving damages against themselves if they gave the plaintiff a verdict, by which appeal they appeared to have been influenced.

J. W. McCullough, for the plaintiff.

C. R. W. Biggar, Q.C., for the defendants.

LANGSTAFF v. McRAE.

Negligence—Overflowing of land—Bursting of timber boom—Right to erect booms in rivers.

Action for damage caused by overflowing the plaintiff's land.

It appeared that the defendants having a quantity of timber boomed in the S. river, the boom broke by reason of the heavy floods, and to prevent the logs floating down the river into the lake at the mouth, the defendants constructed another boom lower down near to a certain bridge. But so great was the force of the water, and the quantity of logs and debris brought down by it, that this boom also broke, and the logs became massed against the bridge.

The jury found that the injury to the plaintiff's lands was caused by excess of rain, and from the jam at the bridge, by which the water was raised. They did not find negligence on the part of the defendants, but said they were guilty of a wrongful act in throwing a boom across the river.

Held, that the defendants were entitled to judgment.

Per BOYD, C.—According to English law a man may lawfully adopt precautions to defend his property against what may be described as the extraordinary casualty of a great flood; and this is not actionable though injury result to his neighbour from this "reasonable selfishness." And again, this use of the boom being lawful by statute, R. S. O. c. 121, s. 5, and no negligence in its construction being pretended, it was impossible to say that what is thus expressly legalized, can be made the ground of action of tort.

J. S. Fraser, for the defendants.

Hoyles, Q.C., for the plaintiff.

SCANLON v. SCANLON.

Will—Construction—Devise of lot facing on two streets by description of house facing on one.

In 1867 M. S. purchased a strip of land in Toronto with a frontage of 26 feet on A. street by a depth of 200 feet to a lane 20 feet wide. In 1882 the city converted this lane into a street. At the time of the purchase by M. S. there was on the land a house facing A. street, known as No. 32, and also a

house facing P. street, known after it became a street as No. 21. They were always occupied as separate and distinct tenements. Each house had a fence in the rear, and between the fences was some land which had been in a way used in common by the occupants of the two houses. In 1886 M. S. by his will devised to J. S. "all that real estate now owned by me, being No. 32 on the north side of A. street, for and during his life," and afterwards over, and then made a general residuary devise of the rest of his land.

Held, that the specific devise was confined to No. 32 A. street and the lands appertaining to it, to the exclusion of the house on P. street and the lands appertaining to it.

DuVernet, for the plaintiff.

E. D. Armour, Q.C., for the defendants.

THOMPSON v. WRIGHT.

Master and servant—Workmen's Compensation for Injuries Act—Machinery—Accident—Negligence—Employer's liability—Knowledge of employer of danger of employee—Factories Act—Want of guard.

The plaintiff, a lad of seventeen years of age, worked at a stamp machine in the defendants' factory. Part of his duty was to clean the upright part from oil which ran down from oil holes over the shafting. There was a space of about twelve inches between this upright and the cog-wheel, and to clean when the wheel was in motion was very dangerous. Being refused cotton waste and even rags for this work, he finally took to using pieces of bagging as the only thing he could get. On the occasion of the accident he had wrapped a piece about his hand, but one end flapping loose got caught in the cogs and the plaintiff lost his hand.

The evidence showed that the employer was daily in the workshop and saw him cleaning the machine under the same circumstances in which he was hurt, and did not forbid him. The jury found that there was no contributory negligence and awarded the plaintiff a verdict of $1,400. It appeared that a cheap and simple guard would have prevented the accident.

Held, that as the place where the plaintiff worked was dangerous, and called for a guard under the provisions of the Factories Act, the failure to furnish such a guard was *per se* evidence of negligence on the part of the defendants; (2) that the employer was also chargeable with personal negligence in seeing this lad, a minor, working with improper appliances, in a dangerous place, and not making proper provision for his safety by supplying him with waste, or without having the machinery stopped while the cleaning was going on.

Judgment in the plaintiff's favour for the $1,400 affirmed with costs.

McCarthy, Q.C., for the defendants.

Lynch-Staunton, for the plaintiff.

In re MARRIOTT, MARRIOTT v. McKAY.

Will—Benefit under, to widow—Dower—Election.

A testator by his will devised his real estate to his executors to be by them sold, and four per cent. of the proceeds paid to his widow, and the balance invested, and the income paid to his widow during her life, and afterwards the proceeds to be divided as directed; and he gave the rents, until the real estate was sold, to his widow.

Held, that the widow was put to her election; that she could not claim dower and to be tenant of the freehold at the same time.

Hoyles, Q.C., for the widow.

J. A. Robinson, for the next of kin.

O'BRIEN v. SANFORD.

Master and servant—Workmen's Compensation for Injuries Act—Elevator—Accident—Negligence—Employer's liability—Employment of infant under twelve—Factories Act.

The plaintiff, a lad under twelve, was hired to work a hoist for the defendants in their factory. A larger boy, who had been in charge before, was detailed for a few hours one afternoon to go up and down with the plaintiff so as to show him how to raise and lower the hoist. The elevator was worked by ropes on the outside of the cab or frame which was handled by the person standing within, through a square opening cut in the framework. The plaintiff was cautioned by the bigger boy against putting his head out at this place when the hoist was going.

The elevator stopped when going up, and the plaintiff put his head out of the aperture to see what stopped it, when, the elevator starting again, the plaintiff received the injuries complained of. On this evidence the plaintiff was nonsuited in an action against his employers for negligence.

Held, that the nonsuit should be set aside and a new trial ordered.

Per BOYD, C.—The employment of a child under twelve to work an elevator for the uses of a manufacturing concern is made illegal by the Factories Act; and for this reason, the employer has to exercise more than ordinary precautions for the well-being and safe-guarding of minors who have been put into factory work contrary to the prohibition of the legislature.

Lynch-Staunton, for the plaintiff.

G. T. Blackstock and *R. McKay*, for the defendants.

[FERGUSON, J., 29TH APRIL, 1892.

In re CANNON, OATES v. CANNON.

Reference—Delay—Rule 51.

The object of Rule 51 is to protect the Court and its officers from undue delay in the prosecution of references.

Where there has been undue delay in the prosecution of a reference, the party having the conduct of it should not be refused a warrant to proceed, if he applies therefor before any action has been taken by the Master under Rule 51, and there is nothing but delay to interfere with the granting of it.

Arnoldi, Q.C., for W. P. Howland & Co.

COMMON PLEAS DIVISION.

[THE JUSTICES IN BANC, 27TH FEBRUARY, 1892.

REGINA v. McGIBBON.

Summary conviction—Trespass to land—By-law closing road—Defendant acting under bona fide belief of right—Reviewing decision of magistrate.

On a motion to quash a summary conviction for trespass to and, it appeared that in 1834, under the laws then in force, the land in question had been laid out as a road, extending back from the lake shore through a certain lot; that in 1860 the then owner of the lot petitioned the municipal council for leave to close the road by erecting a gate at a named point in the centre of the lot, as otherwise, it was alleged, the petitioner would have to erect some two miles of fencing to enclose his lot; and the same day the municipal council passed a by-law through its three readings, without any publication of the notice of the passing of the by-law, as required by s. 308 of the Municipal Act, 22 V. c. 99. The by-law was not merely for the erection of the gate; but, after reciting that the passage of the by-law was necessary for the closing up of the road leading from the centre of the lot to the lake shore, it enacted that the road was thereby closed. Evidence also was given showing that the complainant, the present owner, had himself got permission to perform statute labour on the road.

Held, that the conviction could not be supported, and must be quashed.

Per GALT, C.J.—The by-law, under the circumstances, was invalid.

Per ROSE, J.—The evidence disclosed that the defendant acted under a fair and reasonable supposition that he had the right to do the act complained of; and that in such case the decision of the magistrate will be reviewed.

Aylesworth, Q.C., for the defendant.

W. R. Meredith, Q.C., for the complainant.

[THE DIVISIONAL COURT.

McLEAN v. CLARK.

Partnership—Holding out person as partner—Evidence—Liability.

C., who had been carrying on a general store and hardware business, in May, 1887, sold out the general business to M., retaining the hardware business, and took from M., to secure payment of the purchase money, a chattel mortgage. The businesses continued on the same premises as before, a partition separating the hardware from the general business, but with a door leading from the one to the other, generally kept open. A certificate was registered stating that M. was carrying on the general business alone, under the firm name of C., M. & Co. It was ostensibly carried on under the firm name, which was the name on the sign over the door and in the bill-heads and advertisements.

The plaintiffs, who had supplied goods to C. prior to the sale to M., continued to supply goods, which were charged to the firm, no notice being given them that C. was not a member thereof, while the circumstances led to the belief that he was such member.

Held, that C. was liable for the goods so supplied to the firm.

McCarthy, Q.C., for the plaintiffs.

Britton, Q.C., for the defendant.

REID v. SHARPE.

Fraudulent conveyance—Setting aside—Ranking on estate—Costs.

At the instance of the plaintiffs, who were execution creditors of T., an attaching order issued against M. attaching a debt due from M. to T., and, on non-payment by M., an execution was issued against his lands, whereupon he assigned his estate to S. for the benefit of his creditors. M., with the connivance of S., concealed from the creditors the existence of certain land belonging to M., which he procured S. to transfer to his (M.'s) wife. The trial Judge held that the conveyance to the wife was fraudulent and void under 13 Eliz. c. 5, and must be set aside, and directed that the land be sold and the proceeds paid into Court, and that after paying thereout the plaintiffs' costs between solicitor and client, the balance should be paid out to the assignee for distribution amongst the creditors, including the plaintiffs.

Held, that the decree declaring the conveyance fraudulent and void and allowing the plaintiff to rank on the fund, should stand, and a motion to set it aside be dismissed with costs to be paid by S. personally; but

Quære, whether the direction as to the plaintiffs' costs was proper.

C. Millar, for the plaintiffs.

C. E. Hewson, for the defendant.

[GALT, C.J., 7TH MARCH, 1892.

LEMESURIER v. MACAULAY.

Revivor of action—Lapse of time—Statute of Limitations—Agreement of solicitors—Effect of.

In 1867 an action of ejectment was brought by L., and notice of trial given for, and the action entered for trial at, the assizes beginning 15th October 1867. On 21st October L. conveyed the lands in question to I. On 8th January, 1871, L. died, and on 14th May, 1886, I. conveyed to the plaintiff. In February, 1892, an *ex parte* order was obtained by the plaintiff from a local registrar reviving the action in the plaintiff's name. It appeared that in January, 1872, the then plaintiff's solicitors had notified the defendant's solicitors of the plaintiff's intention of reviving the action, and had given notice of trial for the then next ensuing assizes, whereupon it was agreed between the solicitors that on the plaintiff's solicitors refraining from reviving and from proceeding to trial, the defendant's solicitors would abide by the result of another named suit, and if it was in favour of the plaintiff, an order of revivor might then issue, and judgment be entered for the plaintiff.

Held, that the original action terminated on the 21st October 1867, when the plaintiff conveyed to L.; and therefore, after such lapse of time, and the plaintiff's rights being barred by the Statutes of Limitations, no order of revivor should have issued; and that the Court would give no effect to the agreement made by the solicitors, for to do so would be an injustice to the clients.

Marsh, Q.C., for the defendants.

F. A. Hilton, for the plaintiff.

[MacMahon, J., 17th February, 1892.

ROGERS v. CARMICHAEL.

Will—Construction—Legacy—Period of vesting—Children—Grandchildren.

A testator devised and bequeathed his real and personal estate to his wife for life or until remarried, with certain powers of disposal; and devised and bequeathed the residue, not specifically devised or bequeathed and not sold or disposed of by his wife, immediately after the death or remarriage of his wife, whichever should first happen, to his executors to sell and convert the same into money, and out of the proceeds to pay $500 to each of his five sons, and to divide the balance, share and share alike, between his three daughters; and providing that if the daughters should die before him or before the distribution, leaving issue, the share or shares of the daughters so dying should be divided ratably and proportionately amongst the child or children of said daughter or daughters living at the time of the distribution, so that the issue of any of the daughters who might be dead should receive her or their parents' share.

The widow survived the testator and died without having remarried. A son, C. K. R., and a daughter, M., also survived the testator, but died prior to the widow, the former leaving no issue, and the latter a son, F., and a daughter, M. C., the last named daughter having also died leaving two children.

Held, that the word "children" must be taken in its primary sense, and excluded grandchildren; so that F. took the whole of his mother's share to the exclusion of the children of M. C.

Held, also, that the legacy to C. K. R. became vested on the testator's death, payable on the widow's death; and so his personal representatives were entitled thereto.

W. N. Miller, Q.C., for the plaintiff.

J. Hoskin, Q.C., for the infant defendants.

J. W. Bowlby, Q.C., *D. E. Thomson*, Q.C., and *J. W. Williams*, for the other defendants.

MANITOBA.

In the Queen's Bench.

[TAYLOR, C.J., 23RD APRIL, 1892.

SCHULTZ v. ARCHIBALD.

Real Property Act — Petition — Insufficiency of statutory declaration or affidavit—Informality.

This was a petition presented by caveators under the Real Property Act. They produced a copy of the caveat, and to this exception was taken that it was not supported by any affidavit or statutory declaration, as required by s. 130, s-s. 8, of the Act.

There was annexed a document which began: "I," so and so, "make oath and say," ending "and I make this solemn declaration conscientiously believing the same to be true and in pursuance of the Act respecting extra-judicial oaths," to which was added the signature of the deponent or declarant. Underneath was a memorandum, "declared before me," etc., which was signed by a commissioner for taking affidavits.

Held, that this was neither an affidavit nor a statutory declaration. Where the option of making statutory declaration instead of an affidavit is exercised the exact form given in the statute must be followed.

As the filing of a caveat that complies with the statute is a condition precedent to the jurisdiction of the Court to entertain a petition upon it, and no such caveat had been filed here, the petition was dismissed with costs, fixed at $5, with leave to the caveators to file a further caveat.

Locke, for the caveators.

Cumberland, for the caveatees.

[DUBUC, J., 21ST APRIL, 1892.

In re DOYLE AND RURAL MUNICIPALITY OF DUFFERIN.

Municipal corporations—Local option by-law—Application to quash by-law for repeal of—Limits of municipality changed—Vote taken in new municipality.

Application to quash by-law 22 of the rural municipality of Dufferin.

On 18th August, 1888, the council of the municipality of North Dufferin passed a local option by-law, under the provisions of the Liquor License Act, 1886, as amended by the Liquor License Act, 1888, s. 89. The by-law, designated as No. 64, was submitted to the electors and carried.

In 1890, by the Act respecting the boundaries of municipalities, the municipality of North Dufferin was divided, six of its eleven townships being included in what is now the rural municipality of Dufferin, which is composed of 25 townships.

On 14th November, 1890, the council of the rural municipality of Dufferin passed a by-law No. 22 repealing by-law No. 64 of the former municipality of North Dufferin. This by-law was also submitted to the electors and carried.

The applicant by his summons asked that the by-law No. 22 be quashed, on the following amongst other grounds:—

1. That by-law No. 64 of the municipality of North Dufferin was and is still in force in that part of the rural municipality of Dufferin which was formerly part of the municipality of North Dufferin.

2. That the rural municipality of Dufferin had no authority to submit to all the electors of that municipality the question whether the by-law No. 64 should be repealed or not.

3. That no electors of the rural municipality of Dufferin other than those of that part thereof formerly in the municipality of North Dufferin had any right to vote for the repeal of by-law No. 64.

The principal ground urged by the applicant was that by-law No. 64 could only be repealed by the municipality of North Dufferin, which passed it, and that municipality not being now in existence, there was no provision by which the rural municipality of Dufferin or any other municipality could repeal it, therefore it must stand until, by legislative enactment, some provisions are made for its repeal and the mode of doing it.

By s. 81 of the Act respecting the boundaries of municipalities it is provided that in case in any of the territory changed as to its municipal situation by the provisions of that Act, a local option by-law was in force at the time of the coming into force of that Act, such by-law should continue to affect such territory the same as if that Act had not been passed.

By the Municipal Act, 1890, s. 396, it was enacted that every municipal council may repeal, alter, and amend its by-laws, save as by that Act restricted.

It was established that by-law No. 22 was carried by a sufficient proportion of voters, not only of all the different wards of the municipality, but particularly in the six townships specially affected and in every polling place of the same.

Held, that the application should be dismissed with costs.

The term "its by-laws" in s. 396 of the Municipal Act, 1890, which a municipality can repeal must mean by-laws affecting its territory. The new municipality which includes the added territory, and has full control and power over it, must have such power as is necessary to have the by-law enforced in the territory affected by it, and as such, and to that extent, it must be considered as the successor of the former municipality. In that view a by-law affecting a portion of its territory and still in force may be held to be one of its by-laws, subject to be repealed in due course, and by proper proceedings to that effect.

The most that could be said would be that something unnecessary and useless had been done by the electors of the other 19 townships, in casting their votes in support of by-law No. 22.

A further objection was taken, that if by-law No. 64 was in force in the rural municipality of Dufferin so that that municipality would have the right to pass a by-law repealing the same,

it had not been in force a sufficient length of time, to wit, two years, to entitle the electors to take proceedings to repeal the same.

Held, that if by the Municipal Act, or the Boundaries Act, by-law No. 64 had been made to extend and apply to the whole of the new municipality, or to any territory other than that theretofore affected by it, it might be considered as a new by-law requiring two years before it could be repealed. But it is not so. The by-law comes under the control and power of the new municipality only as applying to the territory affected by it, and it is only to that extent that it becomes a by-law of the new municipality, and the two years must be counted from the time it was made to apply to the territory affected by it.

Mulock, Q.C., for the applicant.

Munson and *Wade*, for the municipality.

[KILLAM, J., 26TH APRIL, 1892.

MOLSONS BANK v. CARSCADEN.

Equitable assignment—Priorities between assignment and attaching orders—Banks and banking—The Bank Act—Powers of banks as to business to be done.

This was an interpleader issue directed to try the right to certain moneys sought to be attached by the defendants in the issue, in the hands of the C. P. R. Co., under various attaching orders issued in actions against Egan Bros.

The moneys were claimed by the plaintiffs as assigned to them or to the plaintiff Nicholls, the manager of the plaintiffs' bank, for securing certain moneys due by the Egans to the bank upon their notes indorsed by Strevel.

Egan Bros., through their agent Edward Egan, agreed with Strevel that, if he would indorse their notes in favour of the bank to the amount of $10,000, they would give an assignment to the bank of all moneys to be payable to them from the C. P. R. Co. on contracts made and to be made by them with that company to secure the notes. In pursuance of this agreement the Egans gave to the plaintiff Nicholls, the manager of the bank, a power of attorney authorizing Nicholls, for the use and benefit of the bank, to collect of the C. P. R. Co. all moneys which then were or thereafter might be payable to the Egans under any contract then made or thereafter to be made by them with that company; the moneys in question were moneys payable on contracts then and thereafter made by the company with the Egans for such railway construction. Strevel indorsed the notes and the advances were made, and there was unpaid thereon an amount equal to the amount in question.

Held, that this transaction amounted to an equitable assignment to the bank of the sum in question. Any order, writing, or act which makes an appropriation of a fund amounts to an equitable assignment of that fund. That moneys arising out of future contracts can be assigned, is clearly settled.

The transaction was also objected to as not within the powers of the bank, which was a corporation subject to the Banking Acts of Canada. The transaction was effected before the coming into force of the Bank Act, 58 V. c. 81, and would appear to be governed by R. S. C. c. 120.

The contention of the defendants was that such a transaction was void unless expressly authorized by that Act, and that such was not the case.

Held, that the lending of money upon such security was properly a part of the business of banking. Although s. 45 of R. S. C. c. 120, refers to the dealing in gold and silver and bills of exchange and the negotiating of promissory notes and negotiable securities, it is not to be understood that this is intended to limit the business of the banks to such transactions. It is equally a part of a banking business to advance moneys upon the security of other choses in actions, except in so far as the Banking Acts expressly exclude such transactions.

For the protection of the indorser Strevel, and under the agreement with him, the plaintiff Nicholls could enforce the assignment.

Verdict entered for the plaintiffs.

Howell, Q.C., and *Munson*, for the plaintiffs.

Ewart, Q.C., *Haggart*, and *Darby*, for the several defendants.

CURRAN v. MUNICIPALITY OF NORTH NORFOLK.

Municipal corporations— Suit for services rendered on instructions of committee—Want of by-law—No benefit taken by corporation.

Appeal from a County Court.

The plaintiff, a solicitor, sued the defendants for his services in drawing an agreement under instructions of a committee of the council and in visiting Winnipeg and attempting to sell debentures of the municipality.

The County Court Judge entered judgment for the plaintiff upon the ground that the municipality accepted and took the benefit of his services; and from this judgment the defendants appealed.

Held, that the appeal must be allowed, and a nonsuit entered, with costs of the appeal, and in the Court below.

In the present case there was no evidence appearing upon the papers to show that the council adopted the agreement drawn by the plaintiff, or availed itself in any way of his services. The council can act only by formal resolutions and by-laws, and none were produced. It must then be assumed that the request referred to was made by individual members of the council. Nothing came of the visit to Winnipeg. There was no benefit to adopt, and the council did not appear to have taken any action based upon it.

Hagel, Q.C., for the plaintiff.

Culver, Q.C., for the defendants.

[BAIN, J., 23RD APRIL, 1892.

MACDONALD v. HARRISON.

Costs—Scale of—Certificate for—Amount involved—County Court jurisdiction —Set-off of excess.

Application for certificate for costs. The judgment at the trial is noted *ante* p. 205.

The plaintiff's counsel conceded that he could not expect any certificate but one to prevent set-off of full Queen's Bench costs.

Held, that the certificate must be refused. To grant such a certificate would be certifying in effect that the plaintiff had reasonable ground for believing he had the right of withdrawing the case from the County Court and bringing it in the Queen's Bench, and this could not be done.

The balance claimed to be payable was within the County Court jurisdiction, but according to the plaintiff's claim the account forming the subject matter to be investigated exceeded in the whole $400. The principal item in the plaintiff's claim was $875, for "three and three-quarters per cent. on $10,000 estimated cost of building," but it was a condition of the agreement the defendants made with the plaintiff that the church the plaintiff was to design and plan should not cost over $7,500. Charging his commission on that amount instead of on $10,000, as he did, his whole claim against the defendants would be less than $400.

Howell, Q.C., for the plaintiff.

Cooper, for the defendants.



Exchequer Court of Canada.

[BURBIDGE, J., 18TH MARCH, 1892.

CLARK v. REGINAM.

Leave to appeal—Extension of time—Application after expiration of time—Exchequer Court Act, 1887, s. 51—53 V. c. 35, s. 1—Grounds for extension.

Where sufficient grounds are disclosed, the time for leave to appeal from a judgment of the Exchequer Court of Canada prescribed by s. 51 of the Exchequer Court Act, as amended by 53 V. c. 35, s. 1, may be extended after such prescribed time has expired. The application in this case was made within three days after the expiry of the thirty days within which an appeal could have been taken.

2. The fact that a solicitor who has received instructions to appeal has fallen ill before carrying out such instructions, affords a sufficient ground upon which an extension may be allowed after the time for leave to appeal prescribed by the statute has expired.

3. Pressure of public business preventing a consultation between the Attorney-General for Canada and his solicitor within the prescribed time for leave to appeal, is sufficient reason for an extension being granted, although the application therefor may not be made until after the expiry of such prescribed time.

Hogg, Q.C., for the motion.

McCarthy, Q.C., and *Christie*, Q.C., contra.

[21st March, 1892.

CORSE v. REGINAM.

Revenue—Goods stolen while in bond in Customs warehouse—Claim for value thereof against the Crown—Crown not a bailee—Personal remedy against officer through whose act or negligence the loss happens.

The plaintiff sought to recover from the Crown the sum of $465.74 and interest for the duty paid value of a quantity of glazier's diamonds alleged to have been stolen from a box in which they had been shipped at London while the box was at the examining warehouse at the port of Montreal.

On the 21st February, 1890, it appeared that the box mentioned was in bond at a warehouse for packages used by the Grand Trunk Railway at Point St. Charles, Montreal, and on that day the plaintiffs made an entry of the goods at the Custom House, and paid the duty thereon ($107.10). On Monday the 24th the Customs officer in charge of the warehouse at Point St. Charles delivered the box to the foreman of the Custom House carters, who in turn delivered it to one of his carters, who took it, with other parcels, and delivered it to a checker at the Customs examining warehouse. The box was then put on a lift and sent up to the third floor of the building, where it remained one or two days. It was then brought down to the second floor and examined, when it was found that the diamonds had been stolen, the theft having been committed by removing the bottom of the box.

Although the evidence that the theft was committed while the box was at the Customs examining warehouse at Montreal was not conclusive, the Court drew that inference for the purposes of the case.

Held, that, admitting the diamonds were stolen while in the examining warehouse, the Crown was not liable therefor.

2. In such a case the Crown is not a bailee. The temporary control and custody of goods imported into Canada, which the law gives to the officers of the Customs to the end that such goods may be examined and appraised, is given for the purpose of the better securing the collection of the public revenue. Without such a power the State would be exposed to frauds against which it would be impossible to protect itself. For the

loss of any goods while so in the custody of the Customs officers the law affords no remedy except such as the injured person may have against the officers through whose personal act or negligence the loss happens.

Hogg, Q.C., for the Crown.

Curran, Q.C., for the claimants.

ADMIRALTY DISTRICT OF NOVA SCOTIA.

[MacDonald, C.J., Local Judge.

THE "QUEBEC."

Maritime law—Salvage of ship and cargo—Principal and agent—Power of attorney given by crew to agent of owners of salving vessel for purpose of adjustment of salvage claim—Construction of.

A crew of a fishing schooner had performed certain salvage services in respect of a derelict ship, and gave the following power of attorney respecting the claim for such services to the agent of the owner of the schooner: "We the undersigned, being all the crew of the schooner *Iolanthe* at the time said schooner rendered salvage services to the barque *Quebec*, do hereby irrevocably constitute and appoint Joseph O. Proctor our true and lawful attorney, with power of substitution, for us and in our name and behalf as crew of the said schooner, to bring suit or otherwise settle and adjust any claim which we may have for salvage services rendered to the barque *Quebec* recently towed into the port of Halifax, Nova Scotia, by said schooner *Iolanthe*, hereby granting unto our said attorney full power and authority to act in and concerning the premises as fully and effectually as we might do if personally present, and also power at his discretion to constitute and appoint from time to time as occasion may require one or more agents under him or to substitute an attorney for us in his place, and the authority of all such agents or attorneys at pleasure to revoke."

Held, that this instrument did not authorize the agent to receive the salvage payable to the crew or to release their lien upon the ship in respect of which the salvage services were performed.

2. That payment of a sum agreed upon between the owners of such ship and the agent to such agent and his receipt therefor, did not bar the salvors from maintaining an action for their services.

A. Morrison and *C. H. Smith*, for the salvors.

W. B. A. Ritchie, for the ship.

ADMIRALTY DISTRICT OF TORONTO.

[McDougall, Local Judge, 31st March, 1892.

THE "GLENIFFER."

Maritime law—Salvage—Maritime lien—Claims for rescue of vessel—Nature of services rendered—Express agreement for payment—Extent of lien—Value of res at time of salvage—Additional value by reason of repairs—Amount of salvage—Costs.

A vessel having been for a long time stranded, the hull was rescued and delivered to a dry dock company for repairs. The value of the hull when so delivered was $300; after the repairs had been made the vessel was sold for $850.

Several salvage claims were made for services rendered before the delivery to the company.

One of the claims included a charge for eighteen days' personal services of the salvor, not on the wreck, but in procuring and forwarding supplies.

Held, not a salvage service.

It was argued that another claim, being for the use of a steam pump, under express agreement, could not rank as a maritime lien for salvage.

Held, that the agreement did not alter the nature of the service as a salvage service, and the Court should give effect to its provisions in awarding remuneration according to its terms, it being free from fraud and made with a competent knowledge of all the facts.

Another claim was for an unsuccessful attempt to pull the vessel off the place where it was stranded. There was no evidence that the service resulted in the slightest benefit; and no agreement shown that the claimant was to be paid in any event.

Held, not a salvage service. Salvage is a reward for benefits actually conferred, not for services attempted and resulting in nothing.

The salvors claimed to be entitled to a lien up to the added value resulting from the work done by the company.

Held, that the value of the *res* is to be taken at the time the vessel is salved and handed over to the salvors; and it is with reference to this value that the amount to be allowed for salvage is to be computed.

There being no special circumstances of danger or risk in the services rendered, and the only exceptional feature being the small value of the property salved, the usual rule was followed and the amount of salvage fixed at $150, being a moiety of the value of the property salved. The other moiety was allowed to the salvors for their costs.

The facts of this case are stated in the judgment.

McDougall, L.J.—This is a motion before me, in the several suits brought against the above named ship, to determine the priorities of the various claims. Four actions have been instituted for salvage, and one by the Toronto Dry Dock Company for repairs. In two of the salvage cases the plaintiffs claim under an express agreement as to amount; in the other two salvage cases the plaintiffs demand a *quantum meruit* by virtue of their alleged salvage services under the maritime lien thereby created. The ship was arrested in the salvage actions while in the possession of the plaintiffs in action No. 10, the Toronto Dry Dock Company, who claim they are entitled to a possessory lien for the amount of their account for repairs and dock charges. The owners do not appear to the actions in this Court. The Dry Dock Company, before any one had commenced an action in the Admiralty Court, had taken proceedings in the High Court of Justice, *in personam*, against the alleged owners, and have secured a judgment by default against two of the defendants in the action, named Baker, for the amount of their claim. The other defendant, Patrick McSherry, disputes their right to recover against him, on the ground that he was not an owner of the vessel at the time she came into the hands of the Dry Dock Company for repairs. McSherry is plaintiff in action No. 6 in this Court, claiming a considerable sum for alleged salvage services. All the alleged salvage services were performed before the ship came into the possession of the Dry Dock Company.

A brief history of the ship will be of value as showing the relative position of all parties. The *Gleniffer* was stranded on the shore of Lake Ontario, near Toronto, several years ago. She became a total wreck, and was abandoned by her then owners to the underwriters. These latter sold the wreck to McSherry; McSherry stripped her of her sails, rigging, chains, anchors, and practically all movable articles, leaving

the hull partially under water, where she lay for a year or two. In the autumn of 1891 McSherry sold the hull and outfit removed by him, to the present owners, two brothers named Baker, for the price or sum of $400, retaining, however, possession of the outfit until the purchase money was paid. The Bakers proceeded at once to recover the hull, employing the plaintiffs in actions Nos. 6, 7, and 8 to aid them in their endeavours to get the vessel afloat. Their efforts were ultimately successful, and the vessel was taken by the salvors, under the direction of the owners, the Bakers, to the yard of the Dry Dock Company, where the vessel had to be docked immediately on her arrival, as she was kept afloat only by the constant working of a steam pump.

The salvage claims may be described briefly as follows:

Action No. 5—Frank Jackman, plaintiff;

67 hours' work of steam tug, at $6.00 per hour	$402 00	
Towing scows	5 00	
		$407 00

Action No. 6—Patrick McSherry, plaintiff;

For use of boat, two lines, anchors, and chains, and 21 days' personal services		267 00

Action No. 7—A. B. Morrison, plaintiff;

For use of steam pump, per express contract, at $20 per diem, for 23 days	460 00	
Half cost of fuel, also per express contract	24 00	
Ten days' use and work of steam scow, and crew (not covered by any agreement as to price), at $20	200 00	
		684 00
Less cash paid on account		167 00
Leaving a balance due of		$517 00

Action No. 8—Joseph Jackson, plaintiff;

Trying to pull Gleniffer off ground, 2½ hours with steamer Eurydice, under express agreement, $50 for the first hour, and $10 for each additional hour	65 00

These efforts were unsuccessful.

The value of the hull when delivered to the Dry Dock Company was about $300; after the repairs made to her by the Dry Dock Company the vessel was sold by the Marshal, without any outfit or sails, for $850.

In the first place it must be determined whether all or any of the foregoing claims are properly salvage claims or not.

McSherry's claim, in action No. 6, is for the use of the boat tackle, anchors, chains, tow lines, tackle lines, etc., and twenty-one days' personal service, of which only three days were spent on the wreck, the remaining eighteen days being occupied in going about town, it is said, procuring and forwarding supplies. I think the services rendered were salvage services, except the eighteen days' personal services in town, which I disallow as salvage.

The claims of the plaintiff in No. 5, Frank Jackman, and of the plaintiff in No. 7, A. B. Morrison, are also clearly for salvage services. It is argued that the claim of the plaintiff Morrison for the use of the steam pump, being under express agreement, cannot rank as a maritime lien for salvage; the express agreement either ousts the Court of jurisdiction, or, if it is found to be an express agreement, it ceases to be a lien, which is a right or privilege seldom arising, it is contended, except in the absence of an express agreement. I cannot concur in this view. The agreement does not alter the nature of the service as a salvage service, and the Court will give effect to its provisions in awarding remuneration according to its terms. An agreement fixing an amount to be paid for the services, whether in writing or verbal, is legally conclusive on both parties as to the amount of the reward: *The Fire Fly*, Swa. 240; *The True Blue*, 2 W. Rob. 177. Such an agreement must, however, be free from fraud or any taint of dishonesty or corruption, and made with a competent knowledge of all the facts: *The Betsy*, 2 W. Rob. 170; *The Kingalock*, 1 Spk. 263. The proof of the alleged agreement rests with the party who sets it up, and satisfactory evidence must be given of its existence: *The Graces*, 2 W. Rob. 297; *The Salacia*, 2 Hagg. 265.

Jackson's claim for attempting to pull the boat off, which effort was entirely unsuccessful, I do not consider a salvage service. There is no agreement shewn that he was to be paid in any event. Salvage is a reward for benefits actually

conferred, not for services attempted, and resulting in nothing. The exertions must in some way contribute to the successful result: *The Edward Hawkins*, Lush. 515. Here there is no evidence or allegation that the service resulted in the slightest benefit whatever.

The claims made for services which I hold to be salvage, with the amounts claimed, will be as follows:—

Patrick McSherry		$213
A. B. Morrison, contract	$484	
Less cash paid	167	
Leaving balance of	317	
Services not under contract	200	
Total		517
Jackman's claim		407
Total		$1,137

The value of the vessel when saved, in the hands of the salvors, and at the date of delivery to the plaintiffs, the Dry Dock Company was $800. This amount is the fund to be distributed unless the salvors are entitled to claim up to the added value resulting from the work done by the Dry Dock Company. Singularly enough, I can find no express decision on the point. In the cases of *The Gustaf*, Lush. 506, and *The Immacolata Concezioni*, 9 P. D. 37, the question was not raised; it may be because the maritime liens which were in priority in these cases were small in amount, compared with the amount realized from the sale of the *res;* probably, in each case, below the actual value of the *res* at the time it came into the hands of the shipright. In the case of *The Gustaf*, the vessel sold for £810, and the liens preferred to the claim of the shipwright came only to £390. In the case of *The Immacolata Concezioni* the proceeds of the sale paid into Court were £2,328; wages were claimed to the amount of about £500. Though that amount was not then settled, priority was given to such wages as had been earned up to the date of the ship's coming into the possession of the shipwright.

The principle laid down in the case of *The Gustaf*, and followed in the case of *The Immacolata Concezioni*, was that the shipwright takes the vessel into his possession *cum onere; i.e.*, with the existing obligations, then completed and done; and it would appear to me that the equitable and just meaning of taking

the vessel *cum onere* would only extend to the value of the *res* at the time of its coming into the shipwright's hands. If the *res* at that time was of less value than the aggregated amount of the maritime liens attaching to the vessel, then the holders of such liens must abate their claims to the extent that their security failed them. I do not mean to say that it is always a simple thing to determine the value of the *res* at the time of its entering the shipwright's yard; but it can be very closely approximated. Especially should this rule be applied to claims for salvage. In the case of such claims the Court rarely allots for salvage more than a moiety of the property saved. Surely a vessel worth $1,000 when saved and worth $5,000 after the shipwright has got through his work on her—though his, the shipwright's, individual claim may exceed, and usually would exceed, the selling value of the patched-up vessel—could not fairly be valued at $5,000 for the purpose of estimating the amount to be awarded for salvage. If this rule were to prevail the salvors need only postpone suing for their claims till the shipwright has expended a large sum on the vessel, and then make a large claim for salvage, and for an award therefor far in excess of the actual value of the property so saved. I think the value of the *res* must be taken at the time she is salved and handed over by the salvors; and it is with reference to this value that the amount to be allotted for salvage is to be computed.

In this case I find the value of the *Gleniffer* when handed over to the Dry Dock Company to have been $300, and I fix the amount of salvage at the sum of $150, being a moiety of the value of the property saved. I do not think there were any special circumstances of danger or risk involved in the services rendered in this case which would warrant my making an award exceeding what appears to be the usual limit in cases of salvage. The only exceptional feature in the present case is the small value of the property saved; but that, standing by itself, I do not consider as sufficiently exceptional or extraordinary to take the case out of the usual rule. I also allow the salvors their costs, but these (including their share of the costs of arrest and sale) are not to exceed the sum of $150, so far as the funds in Court are concerned. This $150 for costs and the $150 allowed for salvage exhausts the full value of the *res* in the hands of

the salvors at the time they delivered it over to the Dry Dock Company for repairs.

The owners in this case not appearing, the salvors are awarded the full value of the property saved, because I assume that the sum which will be taxed for costs will equal, if not exceed, the sum of $150, the other moiety of the value of the *res* saved. This view protects to a just extent the possessory lien of the Dry Dock Company. They will have to pay their proportion of the costs of arrest and sale; these will be in the same proportion to the salvors' share of these costs as $550 bears to $300. After the payment of these costs, and the money awarded to the salvors, the Dry Dock Company will be entitled to the balance of the fund in Court to be applied on their claim and costs.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[MacMahon, J., 2nd April, 1892.

DOUGLAS v. BLACKEY.

Bond—Surety—Affidavit of justification—Cross-examination—Partnership.

A surety on a bond, who is a member of a mercantile partnership, but justifies on his own individual property, not on his share in the partnership, is not compellable, upon cross-examination on his affidavit of justification, to disclose the liabilities of the partnership.

J. J. Warren, for the plaintiff.

Allan Cassels, for the defendants.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 29TH MARCH, 1892.

FRENCH v. LAKE SUPERIOR MINERAL CO.

Sheriff—Poundage—Fi. fa. lands—Sale.

A sheriff cannot have poundage under a writ of *fi. fa.* lands until there has been a sale of lands under the writ.

Merchants' Bank v. *Campbell*, 32 C. P. 170, followed.

Although in matters of practice the decisions of one Court are not binding upon others of co-ordinate jurisdiction, yet where the practice has become well settled by decisions, those decisions should be followed.

Bissicks v. *Bath Colliery Co.*, 2 Ex. D. 459, specially referred to.

D. W. Saunders, for the sheriff of Thunder Bay.

Douglas Armour, for the defendants.

[BOYD C., 27TH APRIL, 1892.

BANNAN v. CITY OF TORONTO.

Municipal corporations—Victualling houses—By-law to forfeit license invalid.

The power given to municipal corporations under s. 285 of R. S. O. c. 184, "to determine the time during which victualling licenses shall be in force," does not confer any power to forfeit such licenses, but merely to fix the duration of the license.

The power to create a forfeiture of property is one which must be expressly given to a corporation by Parliament, and such an extraordinary power is least of all to be inferred where Parliament has provided other means of enforcing by-laws by means of fine and amerciament, as in this case.

DuVernet, for the plaintiff.

H. M. Mowat, for the defendants.

[FERGUSON, J., 31ST MARCH, 1892.

CANADA SOUTHERN R. W. CO. v. TOWN OF NIAGARA FALLS.

Railway company—Grant of easement by—User—Ultra vires—Title by prescription.

A company incorporated for any particular purpose has only power to do acts which are authorized by its charter or can be derived therefrom by reasonable implication as incidental to the purpose for which the company was created.

Held, in this case, that a railway company had no power to grant the privilege of laying pipes along their right of way for the conveyance of water to a town; and that any user thereof short of forty years would not estop the company from objecting to its further use.

H. Symons, for the plaintiffs.

Moss, Q.C., and *A. Fraser*, for the defendants.

[16TH APRIL, 1892.

MEARNS v. ANCIENT ORDER OF UNITED WORKMEN.

Life insurance—Benevolent society—Certificate payable to "legal heirs"—Effect of, between their children and subsequent wife.

A widower, having two children, insured in a benevolent society, and took out his certificate payable "to his legal heirs," and subsequently married a second time. At the time of his death he left his wife surviving, but no other children than the two by his first wife.

Held, that the two children took the whole fund payable under the certificate, to the exclusion of the wife.

Totten, Q.C., for the wife.

E. T. Malone, for the guardian of the infants.

[ROBERTSON J., 5TH APRIL, 1892.

In re TORONTO STREET RAILWAY ARBITRATION.

Contract—Toronto Street Railway Company—Purchase of railway by City of Toronto—Franchise—Property—Road-bed.

Held, that under the agreement and statutes relating to the Toronto Street Railway Company, their "privilege" could not be properly said to have been limited to 30 years only, because there was no obligation on the part of the city to assume the ownership of the railway at the expiration of that term.

Held, however, that this privilege or franchise could not be construed to be "property," the value of which was intended to be taken into account by the arbitrators when the city assumed the ownership of the railway. No provision was made for its valuation, either as to the basis on which it was to be ascertained, or otherwise, indicating that it was not contemplated by the respective parties that the city should, in money, pay the company for that which they, with the sanction and authority of the legislature, had granted for a term, which they had the right to terminate after a fixed period.

Held, also, that the arrangement between the Street Railway Company and the city as to the road-bed did not entitle the former to have this road-bed treated as part of its railway property, to be valued and paid for by the city, which had at its own expense contributed it.

Held, lastly, that the franchise having been terminated by the city, it no longer constituted a property of the company to be valued by the arbitrators.

McCarthy, Q.C., *Moss*, Q.C., and *Shepley*, Q.C., for the Street Railway Company.

Robinson, Q.C., and *S. H. Blake*, Q.C., for the city.

[11TH APRIL, 1892.

CORNELL v. TOWNSHIP OF ASSIGNIACK.

Contempt of Court—Disobedience to injunction—Notice of intended application.

This action was brought to restrain a sale for taxes of lands in the district of Manitoulin. The writ of summons and a notice of motion for an interim injunction were served on the defendants in Manitoulin on the 22nd October. The motion was made on the 29th October, and an injunction granted. The earliest possible way of communicating with the defendants was by mail, reaching Manitoulin Island on the 12th November. The sale sought to be restrained was advertised for the 31st October. The defendants, notwithstanding the service of the writ and notice of motion, proceeded with the sale.

Held, that they were guilty of contempt of Court in so doing, and must pay all costs, and it was no excuse for them to say that if they had not sold on the 31st October, they could not have done so till June of the following year, nor had the merits of the action anything to do with the matter.

E. F. B. Johnston, Q.C., for the plaintiff.

W. M. Douglas, for the defendants.

IN CHAMBERS.

[GALT, C.J., 25TH APRIL, 1892.

ATTORNEY-GENERAL v. VAUGHAN ROAD CO.

Parties—Counter-claim—Exclusion of—Rule 374—Action at suit of Attorney-General—Damages against relators—Pleading.

In an action brought in the name of the Attorney-General, upon the relation of certain persons, to restrain the defendants from collecting tolls or keeping their toll-gates closed upon their road, the defendants alleged by way of defence certain wrongful acts of the relators, and by way of counter-claim asked damages against them.

Held, by WINCHESTER, official referee, that the relators were not in any sense plaintiffs; and the allegations against them must be stricken out.

Held, by GALT, C.J., on appeal, that the defendants' counter-claim was properly excluded under Rule 374.

Lawrence, for the plaintiff.

Kappele, for the defendants.

[MR. WINCHESTER, 26TH APRIL, 1892.

CASSELMAN v. BARRIE.

Writ of summons—Special indorsement—Interest—Rules 245, 739—Summary judgment.

The writ of summons was indorsed with a money claim for the value of a certain quantity of logs at certain prices, and an additional claim for interest on the price.

Held, that as interest was not claimed as arising under a statute or by contract, the writ was not specially indorsed under Rule 245, and an order for summary judgment could not be made under Rule 739.

Wilks v. *Wood*, W. N., 1892, p. 58, followed.

Mackenzie v. *Ross*, 14 P. R. 299, and *Hay* v. *Johnston*, 12 P. R. 596, distinguished.

Semble, if the plaintiff abandoned all claim to interest he might be entitled to judgment in a proper case.

J. A. MacIntosh, for the plaintiff.

Aylesworth, Q.C., for the defendant.

NEW BRUNSWICK.

In the Supreme Court.

[30TH APRIL, 1892.

Ex parte THE WHITE SEWING MACHINE COMPANY.

Attorney—Moneys collected by—Non-payment over—Action to recover—Attachment—Election.

This was an application for an attachment against K. for default in paying over moneys collected for the applicants as their attorney. K. had collected certain moneys as attorney, and held a balance in his hands which he refused to pay over, whereupon the applicants sued K. and recovered a judgment against him in the County Court for the amount claimed. The sheriff had returned *nulla bona* to an execution against K. on the judgment.

Held, that the applicants, by electing to sue at law, had lost their remedy by attachment, and that K. now occupied the position of a judgment debtor.

J. A. Vanwart, Q.C., for the applicants.

MURCHIE v. HEDON.

Ejectment—Consent rule—Non-suit—Pleading.

This was an action of ejectment. The defendant had signed the consent rule, but had not delivered his plea. The plaintiff put the plea of not guilty on the record and entered the cause for trial. At the trial the defendant appeared and refused to confess lease, entry, and ouster, on the ground that the cause was not at issue, he not having delivered his plea, whereby the plaintiff became non-suited, and signed judgment by default

against the casual ejector. The Court was now moved to set aside the non-suit, on the ground that issue had not been joined. It appeared that the practice of both parties had been somewhat irregular.

Held, that the non-suit should be set aside, but without costs, and the defendant have twenty days in which to deliver his plea; otherwise the plaintiff to be at liberty to sign judgment by default.

Ex parte SPRAGUE.

Canada Temperance Act—51 V. c. 34, s. 8—Information.

Held, that in prosecutions for violations of the second part of the Canada Temperance Act, brought before two justices of the peace, an information laid before one justice is insufficient.

A. I. Trueman, for the applicant.

Gregory, Q.C., contra.

BISHOP OF FREDERICTON v. ROE.

Ejectment—Vacant possession—Judgment nisi—Service.

Held, that in ejectment to obtain possession of vacant premises where no distress is found, the rule which is granted by the Court is for judgment *nisi* against the casual ejector, and need not be served.

Stephenson v. *True*, 17 N. B. Reps. 743, and *Crothers* v. *Roe*, 19 N. B. Reps. 133, followed.

Ex parte ERICKSON.

Canada Temperance Act—Instructions to counsel to defend do not warrant him in pleading guilty.

This was an application for a *certiorari* to quash a conviction for unlawfully selling intoxicating liquor contrary to the Canada Temperance Act. Affidavits showed that the defendant told her husband to employ counsel to defend the case, which he did.

The counsel was instructed to appear and defend. At the trial, in the absence of the defendant, he pleaded guilty to the charge, for the reason that he believed the same capable of proof; and the defendant was accordingly convicted by the magistrate.

Held, that instructions to an attorney to appear and defend a case did not warrant him in pleading guilty to the charge; and the conviction was quashed.

A. I. Trueman, for the applicant.

Blair, A.-G., contra.

Ex parte EDWARDS.

Canada Temperance Act—Prosecution—Judge's order staying proceedings—Effect of—Adjournment—Summary conviction.

E. was prosecuted for a fourth offence against the provisions of the second part of the Canada Temperance Act. At the trial a witness for the prosecution refused to answer the question, "Did you purchase intoxicating liquors in defendant's premises between the dates named in the information?" alleging as his reason that in doing so he believed he would criminate himself by making himself liable to a prosecution. The magistrate committed the witness for contempt in refusing to answer. An application was made to a Judge of this Court for an order *nisi* for a *certiorari* to remove the proceedings upon which the witness had been committed, and in granting that order, the Judge, under a misapprehension of the facts, ordered all proceeding then being taken against E. to be stayed. This order was served on the magistrate, who obeyed it by making a memorandum on his record of the service, and adding "Court separated." This happened on the 18th March, and on the 25th of the same month an order was served on the magistrate from the same Judge by which the stay of proceedings in this case was removed, counsel for both parties being present. The magistrate then resumed the case, subject to the objection of E.'s counsel that the Court having separated on the 18th inst., without adjournment, the magistrate had now no jurisdiction to proceed. The magistrate did proceed with the case, heard further evidence for the prosecution and evidence for the defence, and convicted the

defendant, and imposed a penalty of two months' imprisonment. A rule *nisi* for a *certiorari* having been obtained on the above objection, the Court on the return of the rule,

Held, that the magistrate should have adjourned the hearing on being served with the stay; and ordered the rule for a *certiorari* to be made absolute.

J. A. Vanwart, Q.C., for the applicant.

J. W. McCready, contra.

ADAMS v. NOONAN.

Promissory note—Bills of Exchange Act—Evidence—Delivery of note to plaintiff.

This was a motion for a new trial. The action was brought on a promissory note indorsed to the plaintiff by the payee, to which the defendant pleaded no indorsement. The ground relied on for a new trial was that there was no evidence of the delivery to the plaintiff of the note on which the action had been brought.

Held, that under the provisions of the Bills of Exchange Act such evidence was not necessary; and a new trial was refused.

M. B. Dixon, for the plaintiff.

Gregory, Q.C., for the defendant.

REGINA v. RICKER.

Criminal law—Uttering a forged note—Incipient fraud.

This was an appeal from the decision of the Judge of the County Court for Westmoreland under the Speedy Trials Act. The prisoner was charged with uttering a forged note, and convicted. It appeared that the prisoner was in custody on a capias in a civil action for debt, and the constable in whose charge he was had instructions to release him and accept as security for the debt the joint promissory note of himself and his son Manley Ricker. The prisoner produced to the constable a note signed

by himself and Whitfield M. Ricker, his son, and represented that Whitfield M. Ricker was that one of his sons known as "Manley." The "M" in the name, he said, stood for Manley. The note was accepted, and R. released from custody. Afterwards it was discovered that Whitfield M. was an entirely different person from Manley, the two being different sons of the prisoner.

Held, that the facts showed that the note had in its inception been made with the clear intention to defraud; and that the conviction should be confirmed.

Held, *per* KING, J., that had the charge been forgery, the case would have been even more clear.

Pugsley, S.-G., for the Crown.

W. B. Chandler, for the prisoner.

DEDRICK v. STILES.

Pleading—Striking out pleas as false—Action on promissory note—"General issue."

This was an appeal from the decision of the County Court Judge for Westmoreland. The action was on a promissory note. The defendants appeared and pleaded the general issue. The plaintiff applied to the Judge to strike out the defendants' plea as being false. After hearing both parties the Judge ordered the plea to be struck out. The defendants appealed to this Court. The plaintiff's counsel raised the preliminary objection that this being an interlocutory decision, an appeal would not lie, which the Court overruled; and after hearing the merits,

Held, that the power of a Judge to strike out pleas as false, given by C. S. c. 37, did not apply to a plea of the general issue.

R. Barry Smith, for the plaintiff.

A. S. White, for the defendants.

Ex parte BOYER.

Canada Temperance Act—Summary conviction—Minute of adjudication—Variance—R. S. C. c. 178, s. 53.

B. was summarily convicted for unlawfully selling intoxicating liquor contrary to the Canada Temperance Act. The minute of adjudication required by R. S. C. c. 178, s. 53, to be drawn up by the magistrate on the conclusion of the case, adjudged the defence proved as charged in the information, and ordered B. to pay a fine of $50 and costs forthwith; and in default of sufficient distress whereon to levy such fine and costs, to be imprisoned in the common gaol of the county, at, etc., for the space of two months, "unless said fine and costs be sooner paid." The conviction followed the form (J) in the schedule to 51 V. c 34, and included "costs and charges of conveying to gaol."

Held, that the variance between the minute of adjudication and the conviction was sufficient to warrant the rule being made absolute to bring up the original proceedings; and the Court declined to entertain an application to amend the conviction until the return of the *certiorari*.

J. A. Vanwart, Q.C., and *A. I. Trueman*, for the applicant.

J. W. McCready and *Louis E. Young*, contra.

Ex parte WILBUR.

Canada Temperance Act—Second conviction for second offence quashed.

W. was summarily convicted for a second offence against the second part of the Canada Temperance Act, and fined $100. At the trial the certificate of a previous conviction for a second offence was put in evidence.

Held, that there could be but one conviction for a second offence against the second part of this Act.

Ex parte Edwards, 12 Occ. N. 48, followed.

A. I. Trueman, for the applicant.

J. W. McCready, contra.

MANITOBA.

In the Queen's Bench.

[THE FULL COURT, 2ND MAY, 1892.

NEWMAN v. LYONS.

Fraudulent preference—Husband and wife—Judgment recovered against husband—Intent to defraud future creditors.

This was an interpleader issue, the matter in dispute being the priority to which a judgment recovered by the defendant against her husband, William Lyons, was entitled. The issue provided for the trial of two questions: 1st—Were the writs of execution of the plaintiffs against William Lyons, or some or one of them, entitled to priority over the writ of execution of the defendant against William Lyons, with respect to the proceeds of the sale of the goods and chattels of the said William Lyons, realized by the sheriff? 2nd—Was the execution of the defendant and the judgment whereon the same was founded a preference which rendered the same void as against the writs of the plaintiffs?

The defendant's judgment was not one which would, under the terms of s. 122 of the A. J. Act, 1885, be null and void. The obtaining it speedily was facilitated by or on the part of the husband, but it was obtained in a regular manner according to the practice of the Court. The action was commenced on 11th June, 1891; an appearance was entered on the 12th; an order to strike out the appearance was obtained on the 16th; judgment was entered on the 17th; and a writ of execution placed in the sheriff's hands on the 26th of June. Actions had been begun by the plaintiffs, or some of them, before this one, but the earliest judgment which could be entered in any of

these was on the 20th of June, the writ of execution being placed in the sheriff's hands on the 29th of June.

The evidence at the trial showed that there was no debt owing to the defendant from her husband for which she could recover a judgment. The judgment was for $2,200, made up of two sums, one of $1,000, said to have been lent to the husband in 1888, and another of $1,200, said to have been lent in 1890. The husband was at both these periods heavily in debt. The first sum was money paid for a loss under a policy of fire insurance upon goods, partly the property of the husband and partly of the wife, principally upon furniture, great part of which was undoubtedly the property of the husband. The other sum was derived from property which had been the property of the hus' and, somehow conveyed to the defendant, but for which she gave no consideration.

DUBUC, J., who tried the case, stated in his judgment that the transactions in question were contrivances used for the purpose of putting the properties out of the reach of the husband's creditors, but he held that the debts which the husband owed at the time of these transactions were paid afterwards, and before any indebtedness to the plaintiffs was incurred, so he failed to see how they could lawfully and reasonably contend that the anterior transactions between Lyons and his wife were fraudulent against them, and he entered a verdict for the defendant.

A motion to set aside the verdict for the defendant was granted with costs, and a verdict entered for the plaintiffs on the first question raised by the issue. On the second question the verdict for the defendant was ordered to stand.

Held, upon the evidence, that the transactions which culminated in the judgment attacked were entered into, not only for the purpose of hindering, defeating, or delaying then existing creditors, and were contrivances for putting property out of the reach of the husband's creditors, but were also entered into in contemplation of future indebtedness.

Aikins, Q.C., and *Cooper*, for the plaintiffs.

Howell, Q.C., for the defendant.

[TAYLOR, C.J., 26TH APRIL, 1892.

In re LAKE WINNIPEG TRANSPORTATION CO.

BERGMAN'S CLAIM.

Maritime law—Master of vessel—Claim for wages—Winding-up proceedings—Leave given to sue in Exchequer Court to enforce maritime lien.

The applicant Bergman was the master of the steamer *Aurora*, the property of the above company. When the company went into liquidation Bergman filed his claim in the winding-up proceedings, and asked to be scheduled on the preference list of creditors. The steamer was mortgaged, and his claim would have ranked after the mortgages, unless he had a maritime lien for his wages, which in a suit in the Admiralty Court would rank before the mortgages. He therefore applied in the winding-up proceedings for leave to proceed in the Exchequer Court to enforce his lien.

Held, that, although it was not clear that the claimant had a lien, as the question could be properly raised only by a suit in the Exchequer Court, he might have leave to proceed there against the steamer. If he had a lien, it was only by proceedings in that Court that he could get relief to the full extent to which he was entitled. The costs of the present motion should be reserved until after that suit was disposed of.

Wade, for the claimant.

Mathers, for the liquidator.

[KILLAM, J., 26TH APRIL, 1892.

RITCHIE v. GRUNDY.

Mechanics' lien—Work to be done to the satisfaction of owner—Work done defective—Possession taken by owner—Work not accepted or completion waived.

This was a suit in equity to enforce a lien claimed under the Mechanics' Lien Act. The bill set up a written contract by which the plaintiff was to build an addition to and make certain

alterations in the defendant's residence according to certain plans and specifications, for the sum of $500; $100 to be paid on a specified date, $200 by a note at three months as the work progressed, and $200 on completion of the work, by note at three months; and also a claim for extras.

The defendant denied the completion of the work according to the plans and specifications, claimed that by the contract the last note was to be at six months, and that by the specifications the work was to be done "so as to be a good job, done in a workmanlike manner," and to the satisfaction of the defendant, and that much of the work was not done in a good and workmanlike manner, or to his satisfaction. The defendant also partly disputed the claim for extras, and set up that before suit he had paid the plaintiff all that he was entitled to. He also claimed damages for non-completion and for delay.

The suit came on for examination of witnesses and hearing, when KILLAM, J., held that the contract implied an agreement that there should be no lien, but that such an agreement was conditional upon the giving of the note stipulated for, and that in the event of default in giving the note the plaintiff could sue to enforce the lien.

As, however, it was uncertain whether the work had been completed according to contract, it was impossible upon this basis to find definitely whether or not the plaintiff was entitled to any lien.

The plaintiff then applied to amend his bill by alleging the variation of the contract by mutual consent and performance by him and acceptance by the defendant of the work, which amendment was allowed.

A large amount of evidence was subsequently given respecting the terms of the specifications, which were not forthcoming, and the character of the work done. The specifications required that the work should be done in a first-class workmanlike manner, of good material, and to the satisfaction of the defendant.

Held, that the work was not done to the satisfaction of the defendant, and that in certain particulars in which the work was defective, his dissatisfaction was based upon reasonable grounds.

Under these circumstances the plaintiff was not entitled to recover upon his bill.

It is clear that, in general, a mere taking of possession and using of a partly completed building, attached under such a contract to the land of the party for whom it is constructed, so that it has become his property as part of the land, does not of itself show a waiver of the right to a completion of the work or raise a liability to pay *quantum meruit*. Such action may in many cases afford evidence of acceptance of the work done as a full performance of the contract or as a performance *pro tanto*. If taking possession and use of the property interfere with the completion, the builder can sue for damages or abandon the contract and sue for the value of the work done. It could not be said that the defendant ever accepted the work as completed according to contract, nor that he ever had any intention to waive completion, nor that he had prevented the plaintiff from completing the work, nor that his acts up to the commencement of the suit were so far inconsistent with the plaintiff's rights as to entitle the latter to abandon the contract and sue for the value of the work done.

As the defendant could not be held liable to pay any sum, the bill must be dismissed with costs.

Mulock, Q.C., for the plaintiff.

Aikins, Q.C., for the defendant.

Supreme Court of Canada.

EXCHEQUER COURT.] [4TH APRIL, 1892.

BURROUGHS v. REGINAM.

Liquor License Act, 1883, s. 6—Salaries of license inspectors—Approval by Governor-General in Council.

On a claim brought by a board of license commissioners appointed under the Liquor License Act, 1883, for moneys paid out by them to license inspectors, with the approval of the Department of Inland Revenue, but which were found to be in excess of the salaries which two years later were fixed by Order in Council under s. 6 of the Act:—

Held, affirming the judgment of the Exchequer Court, that the Crown could not be held liable for any sum in excess of the salary fixed and approved of by the Governor-General in Council.

L. H. Burroughs, for the appellants.

Hogg, Q.C., for the Crown.

QUEBEC.]

LACOSTE v. WILSON.

Gift inter vivos—Subsequent deed—Giving in payment—Registration—Arts. 806, 1592, C. C.

The parties to a gift *inter vivos* of certain real estate, with warranty by the donor, did not register it, but by a subsequent deed, which was registered, changed its nature from an apparently gratuitous donation to a deed of giving in payment.

In an action brought by the testamentary executors of the donor to set aside the donation for want of registration:—

Held, affirming the judgment of the Court below, that the forfeiture under Art. 806, C. C., resulting from neglect to register applies only to gratuitous donations, and as the deed in this case was in effect the giving of a thing in payment (*dation en paiement*), with warranty, which under Art. 1592 is equivalent to sale, the testamentary executors of the donor had no right of action against the donee based on the absence of registration of the original deed of gift *inter vivos*.

Lajoie, for the appellants.

Geoffrion, Q.C., for the respondent.

BALL v. McCAFFREY.

Appeal — Acquiescence in judgment — Jurisdiction—36 V. c. 81 (P.Q.) — Charges for boomage—Agreements—Renunciation of rights—Estoppel by conduct—Renunciation tacite.

In an action in which the constitutionality of 36 V. c. 81 (P.Q.) was raised by the defendant, the Attorney-General for the Province intervened, and the judgment of the Superior Court having maintained the plaintiff's action and the Attorney-General's intervention, the defendant appealed to the Court of Queen's Bench (appeal side), but pending the appeal acquiesced in the judgment of the Superior Court on the intervention and discontinued his appeal from that judgment.

On a further appeal to the Supreme Court of Canada from the judgment of the Court of Queen's Bench on the principal action, the defendant claimed he had the right to have the judgment of the Superior Court on the intervention reviewed.

Held, that the appeal to the Court of Queen's Bench from the judgment of the Superior Court on the intervention having been abandoned, the judgment on the intervention of the Attorney-General could not be the subject of an appeal to this Court.

T. McC. brought an action against G. B. for $4,464 as due to him for charges which he was authorized to collect under 36 V. c. 81 (P.Q.) for the use by G. B. of certain booms in the Nicolet river during the years 1887 and 1888. G. B. pleaded that under

certain contracts entered into between T. McC. and himself and his *auteurs*, and the interpretation put upon them by T. McC., the repairs to the booms were to be and were in fact made by him, and that, in consideration thereof, he was to be allowed to pass his logs free; and also pleaded compensation of a sum of $9,620 for use by T. McC. of other booms and repairs made by him on T. McC.'s booms, and which by law he was bound to make.

Held, reversing the judgment of the Court below, that, as there was evidence thal T. McC. had led G. B. to believe that under the contracts he was to have the use of the booms free in consideration of the repairs made by him to the piers, etc., T. McC. was estopped by conduct from claiming the dues he might otherwise have been authorized to collect.

Held, further, that, even if T. McC.'s right of action was authorized by the statute, the amount claimed was fully compensated by the amount expended in repairs for him by G. B.

Laflamme, Q.C., and *Charbonneau*, for the appellant.

Hoonan, for the respondent.

Brodeur, for the Attorney-General.

GRANT v. REGINAM.

Petition of right (P.Q.)—Sale of timber limits—Licenses—Plan—Description—Damages—Art. 992, C. C.

Where the holder of a timber license does not verify the correctness of the official description of the lands to be covered by the license before the issue of the license, and after its issue works on lands and makes improvements on a branch of a river which he believes forms part of his limits, but are subsequently ascertained by survey to form part of adjoining limits, he cannot recover from the Crown for losses sustained by acting on an understanding derived from a plan furnished by the Crown prior to the sale; FOURNIER, J., dissenting.

PATTERSON, J., was of opinion that the appellant's remedy should have been by action to cancel the license under Art. 992, C. C., and with a claim for compensation for moneys expended.

Hutchinson, Q.C., for the appellant.

Bedard, for the respondent.

LA SOCIETE CANADIENNE-FRANCAISE v. DAVELUY.

Appeal—Acquiescence in judgment—Attorney ad litem—Agreement not to appeal—Right of appeal—Building society—C. S. L. C. c. 69—By-laws—Transfer of shares—Pledge—Art. 1970, C. C.—Insolvent creditor's right of action—Art. 1981, C. C.

By a judgment of the Court of Queen's Bench the defendant society were ordered to deliver up a certain number of its shares upon payment of a certain sum. Before the time for appealing expired the attorney *ad litem* for the defendants delivered the shares to the plaintiffs' attorney and stated he would not appeal if the society were paid the amount directed to be paid. An appeal was subsequently taken, before the plaintiff's attorney complied with the terms of the offer. On a motion to quash the appeal on the ground of acquiescence in the judgment:—

Held, that the appeal would lie.

Per TASCHEREAU, J., that an attorney *ad litem* has no authority to bind his client not to appeal by an agreement with the opposing attorney that no appeal would be taken.

A by-law of a building society (the appellants) required that a shareholder should have satisfied all his obligations to the society before he should be at liberty to transfer his shares. One P., a director, in contravention of the by-law, induced the secretary to countersign a transfer of his shares to the Banque Ville Marie as collateral security for an amount he borrowed from the bank, and it was not till P.'s abandonment or assignment for the benefit of his creditors that the other directors knew of the transfer to the bank, although at the time of his assignment P. was indebted to the appellant society in a sum of $8,744, for which amount under the by-law his shares were charged as between P. and the society. The society immediately paid the bank the amount due by P. and took an assignment of the shares held by the bank. The shares being worth more than the amount due to the bank, the curator to the insolvent estate of P. brought an action claiming the shares as forming part of the insolvent's estate, and with the action tendered the amount due by P. to the bank. The society claimed that the shares were pledged to them for the whole amount of P.'s indebtedness to them under the by-laws.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada (appeal side) and restoring the judgment of the Superior Court, that the payment by the society of the bank's

claim annulled and cancelled the transfer made by P. in fraud of the company's rights, and that the shares in question must be held as having always been charged under the by-laws with the amount of P.'s indebtedness to the society, and that his creditors had only the same rights in respect of these shares as P. himself had when he made the abandonment of his property, viz., to get the shares upon payment of P.'s indebtedness to the society; FOURNIER and TASCHEREAU, JJ., dissenting.

Laflamme, Q.C., and *Charpentier*, for the appellants.

Beique, for he respondent.

DORION v. DORION.

Substitution—Curator to—Action to account—Indivisibility of—Will—Construction—Transfer—Effect of—Sale of rights—Mandatory—Negotiorum gestor—Parties to suit for partition—Art. 920, C.C.P.—Purchase by co-heir while curator—Art. 1484, C. C.

P. A. A. D., the respondent, as representing the institutes and substitutes under the will of the late J. D., brought an action against J. B. T. D., the appellant, who was one of the institutes and had acted as curator and administrator of the estate for a certain time, for reddition of an account of three particular sums which the plaintiff alleged the defendant had received while he was curator.

Held, reversing the judgment of the Court below, that an action did not lie against the appellant for these particular sums, apart from and distinct from an action for an account of his administration of the rest of the estate.

The plaintiff in his action alleged that he represented S. D., one of the substitutes, in virtue of a deed of release and subrogation by which it appeared he had paid to S. D.'s attorney for and on behalf of the defendant a sum of £437 7s. 6½d., the defendant having, in an action of reddition of account, settled by a notarial deed of settlement with S. D. for the sum of $4,000, which he agreed to pay, and for which amount the plaintiff became surety.

Held, that as the notarial deed of settlement gave the defendant a full and complete discharge of all redditions of account as curator or administrator of the estate, the plaintiff could not claim a further reddition of account of these particular sums.

The plaintiff also claimed that he represented F. D. and E. D., two other institutes under the will, in virtue of two assignments made to him by them on 21st January, 1869, and 15th November, 1869, respectively. In 1865, after the defendant had been sued in an action of reddition of account, by a deed of settlement F. D. and E. D. agreed to accept as their share in the estate the sum of $4,000 each, and gave the defendant a complete and full discharge of all further redditions of account.

Held, affirming the judgment of the Court of Queen's Bench, that the defendant could not be sued for a new account, but could only be sued for the specific performance of the obligations he had contracted under the deed of settlement.

In 1871 C. Z. D., another of the institutes, died without issue, and by his will made the defendant his universal legatee. The plaintiff claimed his share in the estate under a deed of assignment, made by the defendant to the plaintiff in 1862, of all right, title, and interest in the estate.

Held, that the plaintiff did not acquire by the deed of 1862 the defendant's title or interest in any portion of C. Z. D.'s share under the will of 1871.

Held, further, that under the will of the late J. D., C. Z. D.'s share reverted to the surviving institutes and substitutes, and that all the defendant took under the will of C. Z. D. was the accrued interest on the capital of the share at the time of his death.

By the judgment appealed from the defendant was condemned to render an account of his own share in the estate which he transferred to the plaintiff by notarial deed in 1862, and also an account of the share of C. D., another institute, who in 1882 transferred his rights to the plaintiff. The transfer made by the defendant was in his capacity of co-legatee of such rights and interests as he had at the time of the transfer, and he had at that time received one-sixth of the sums for which he was sued to account.

Held, reversing the judgment of the Court below, that the plaintiff took nothing as regards these sums under the transfer, and even if he was entitled to anything, the defendant would

not be liable in an action to account as the mandatory or *negotiorum gestor* of the plaintiff.

2. That F. D. and E. D. having acquired an interest in C. Z. D.'s share after they had transferred their shares to the plaintiff in 1869, the plaintiff could not maintain his action without making them parties to the suit: Art. 920, C. C. P.

Quære, per TASCHEREAU, J.—Was not the transfer made by the institutes E. D. and F. D. to the plaintiff, while he was acting as curator to the substitution, null and void under Art. 1484, C. C.?

Lacoste, Q.C., and *Bonin*, Q.C., for the appellant.

Madore, for the respondent.

BRITISH COLUMBIA.]

HOGGAN v. THE ESQUIMAULT AND NANAIMO RAILWAY COMPANY.

WADDINGTON v. THE ESQUIMAULT AND NANAIMO RAILWAY COMPANY.

Government lands—Pre-emption—Statutory right to—Lands reserved.

By 47 V. c. 14, B.C., the Settlement Act, certain lands in the Province, previously withdrawn from settlement, purchase, or pre-emption, were thrown open to settlers, and it was provided that for four years from the date of the Act "it should be open to" actual settlers for agricultural purposes at the rate of $1 per acre, except coal and timber lands, which were expressly reserved. A part of these lands, which had been reserved for a town site many years previously, had been granted to the defendant company as part consideration for the construction by them of a railway from Esquimault to Nanaimo. H. and W., claiming that the statute entitled them to a conveyance of these lands from the company, applied under the Pre-emption Act for registration of lots of 160 acres each, which was refused and the

refusal was confirmed by the chief commissioner. No appeal was taken to the Supreme Court, as the Act allows, but suits were brought against the company by each applicant for a declaration of his right to purchase the lands upon payment of the price of $1 per acre therefor.

Held, affirming the decision of the Supreme Court of British Columbia, that the Settlement Act did not operate to open for settlement lands reserved as these were for a town site; and that the applicants had never entered thereupon as actual settlers for agricultural purposes, but had express notice when they entered that they were not open for settlement as agricultural lands.

S. H. Blake, Q.C., for the appellants.

Moss, Q.C., and *Darie*, Q.C., for the respondents.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[BOYD, C., 16TH MAY, 1892.

ASHBRIDGE v. ASHBRIDGE.

Will—Construction—Devise to sons without words of limitation—"Die without lawful issue"—"Survivor"—Estate in fee simple—Estate tail.

The testator died in 1845, and by his will devised a farm to his two sons, without words of limitation, to be equally divided between them, adding, "And in case either of my sons shall die without lawful issue of their bodies, then his share to go to the remaining survivor."

Held, that the gift in the earlier part of the devise, though without words of limitation, was sufficient to carry the fee to the sons unless a lesser estate appeared to be intended on the face of the will.

Both sons outlived the father; one died in 1874 leaving issue; the other died without issue in 1890.

Held, that the son who first died had an estate in fee simple absolute in one half of the land; and, as the other left no survivor, he was not within the words of the will, and nothing had happened to divest him of the estate in fee given by the earlier part of the will, and therefore he also died seized in fee simple of one half of the land.

The word "survivor" is to be read as meaning "longest liver," not "other."

The words "die without issue" do not mean an indefinite failure of issue which would give rise to an estate tail.

Shepley, Q.C., for the plaintiff.

S. H. Blake, Q.C., and *F. M. Lake*, for the defendants.

NOVA SCOTIA.

In the Supreme Court.

In re RICHARDSON.

Probate Court—Jurisdiction of—Allowance of claim filed for balance due on mortgage given by executors to raise money to pay debts of testator.

R. R. died seized of certain estate, which he devised to his wife for life, and directed that after her death all his property should be sold, and the proceeds equally divided between his children or their representatives. The personal property having been found insufficient to pay debts, the executors, in August, 1875, obtained a license from the Court of Probate to borrow, upon mortgage of the real estate, a sum not exceeding $1,600, to pay the debts and legacies of the deceased, and the expenses of settling his estate.

The executors mortgaged a portion of the real estate for $1,500, and applied the proceeds to the payment of the debts of the deceased. The executors' accounts were never passed. The property mortgaged was not kept in repair, but depreciated in value, and the interest was allowed to accumulate.

In June, 1889, the property was sold under foreclosure proceedings for $800, and in July, 1889, after the death of the widow, the petitioners rendered an attested account, and sought to rank on the estate for the balance due on the mortgage.

Held, on appeal from the decision of the Judge of Probate allowing the claim, that the petitioners were not entitled to rank on the estate for the balance claimed.

Per WEATHERBE, J., and GRAHAM, E.J., that the Court of Probate had no jurisdiction to sustain or adjudicate upon the claim of the petitioners, it not being the claim of a creditor, or such a claim as is in express terms assigned to the jurisdiction of the Court.

That this point was covered by the 8th ground of appeal:—"Because the said debt was not contracted by the testator."

PETERS v. SEAMAN.

Action for goods sold and delivered—Evidence.

To an action for goods sold and delivered the defendant pleaded that the goods were sold, if at all, to the defendant by the Minudie Mining and Transportation Company; that the plaintiff received from the company drafts accepted by them in payment for the goods; that he subsequently recovered judgment against the company for the price of the goods; and that the defendant, believing the goods to have been sold by the plaintiff to the company and by the company to him, paid the company for them.

The evidence showed that the goods were ordered by the defendant, through his agent C., and were charged, sent to, received by, and used by him. There was a written order for the goods in the defendant's own writing, which was filled by plaintiff in the ordinary course of business. The defendant's agent C. was also agent of the company, and as such ordered goods on their account from the plaintiff and others. He informed the plaintiff that the company would pay the defendant's bill, and, acting on the information, the plaintiff included the amount of the bill in a draft on the company. The draft having been refused by the company, the plaintiff wrote a letter claiming that his account was against the company only, and that the goods were purchased by the company's agent for the company.

On the issues raised on these facts, judgment was given in the County Court in favour of the defendant.

On appeal the judgment was reversed with costs.

In re ELIZA ROBERTSON.

Evidence—R. S. c. 107, s. 16—Executors and administrators—Proceeding for settlement of estate.

On the settlement of the accounts of the executrix in the Probate Court, evidence was tendered in opposition to a claim made by her against the estate of the deceased. The Judge rejected the evidence as not being receivable under R. S. c. 107, s. 16, and allowed the claim.

Held, that the section applies only to actions brought by or against the executor or administrator; and that the proceeding for the settlement of the estate not being such an action, the evidence was improperly excluded.

DEMPSTER v. ELLIOTT.

Attachment of debts—Garnishee order attaching the judgment debtor's interest in a residuary bequest—Third party not entitled to dispute the garnishees' liability—Order 43, Rules 2, 4, 5.

On the 4th October, 1887, the plaintiffs obtained a garnishee order to attach all debts owing or accruing due from the defendants F. C. E. and E. G. E. to the defendant T. G. E. to respond to a judgment which the plaintiffs had obtained in the Supreme Court against T. G. E.

The judgment debtor T. G. E. was one of the residuary legatees under a will, of which F. C. E. and E. G. E. were executors. At the time of the service of the order the will had been admitted to probate, but the real estate belonging to the estate had not been sold, and the residue could not be ascertained until this had been done. The estate was not finally wound up, nor the share of the residue to which F. C. E. was entitled fixed, until 9th May, 1880.

The order was attacked by subsequent attachers.

Held, per McDONALD, C.J., affirming the judgment of RITCHIE, J., appealed from, that the legacy of the share of the residuary estate was a debt, at the time of the service of the garnishee order, for which the executors were liable to be sued.

Per WEATHERBE, J., that under Order 43, Rule 4, the only party who has power to dispute his indebtedness to the judgment creditor is the garnishee. That a third party called in under Rule 5 can be called in only for one purpose, namely, to "state the nature of his claim."

That in the present case the third parties could not dispute the liability of the garnishees, and that on this ground the appeal should be dismissed with costs.

TOWNSHEND, J., dissented.

TOWNSHEND v. BROWN.

Administration action—When it can be brought—Deed superseding will—Void condition.

An action for administration can be brought against the executor before the expiration of the period of one year allowed to creditors to put in their claims.

A testator appointed the plaintiff his executor, with power to collect and receive debts, and directions to sell real estate and convert it into money, and out of the proceeds pay debts and distribute the balance among his children as directed by his will. Subsequently he made a trust deed conveying to his daughter all his real estate for the purpose of paying debts, support him for life, provide for the education of a grandson, and in further trust to hold the proceeds of property remaining after the grantor's death, and distribute the same according to the provisions of his will.

Held, by McDONALD, C.J., unappealed from, that the trust deed superseded the will, except as incorporated by reference in the deed; and *per Curiam*, that the Court could order a sale by interlocutory decree.

The testator by a codicil released his executrix from any indebtedness on condition *inter alia* of her in no way making claim for any cause against his estate.

Held, that as this condition would prevent her from taking or deferring legal proceedings necessary to protect her rights as trustee, it was void, and a certain promissory note made by her to the testator, which the Judge had held was assets, had been released.

NEW BRUNSWICK.

In the Supreme Court.

[10TH MAY, 1892.

REGINA v. ENGLISH.

Criminal law—Crown case reserved—Criminal procedure—Judge's order for grand jury—Additional petit jurors.

This was a Crown case reserved from the Carleton County Court. The prisoner was indicted for assault with intent to kill. When the Court met, it was found that the sheriff had omitted to summon a grand jury, and had only summoned twelve petit jurors. Under the authority of 47 V. c. 14, N.B., the Judge made an order directing the sheriff to summon a grand jury and nine additional petit jurors for the next day, which he did, and the prisoner was tried and found guilty, subject to the following objections which were reserved for the decision of the Court:—
(1) That the order of the Judge to the sheriff directing a grand jury and nine additional jurors was void, because (*a*) there should be a separate order in each case; and (*b*) the order should have been for twenty-one petit jurors and not for nine additional ones.

(2) That the foreman of the grand jury did not initial the names of the witnesses on the indictment who had been examined by the grand jury.

(3) That the jurors were entitled to six days' notice, and the Judge should have adjourned the Court for that purpose.

(4) That the grand jury were not summoned from the body of the county.

Held, that the order of the Judge for a grand and petit jury should have been separate in each case, and the order for the nine additional petit jurors was void, because it should have

been for a full panel of twenty-one jurors, and that therefore the trial was a nullity. The conviction was quashed and a *venire de novo* ordered.

A. B. Connell, for the prisoner.

Blair, A.-G., for the Crown.

BROWN v. MOSS.

Assignment for benefit of creditors—Resulting trust—Deed fraudulent on its face.

This was an appeal from a decree of the Judge in Equity setting aside a deed of assignment for the benefit of creditors. The trust deed provided that the property assigned should first be applied to pay certain preferred creditors therein named, and the residue to the other creditors who should sign the deed and release the assignor from their claims. The sole question in the case was whether the assignment set out in the bill was void under the statute of 13 Eliz., because it was made to delay or defeat creditors. The Equity Judge reluctantly followed the case of *Whitman* v. *Union Bank of Canada*, 16 S. C. R. 410, and declared the assignment fraudulent and void. On appeal to this Court:—

Held, that the appeal should be dismissed, the Court feeling themselves constrained to follow the decision of the Supreme Court of Canada in the case above-named.

W. Watson Allen, for the plaintiffs.

Harvey Atkinson, for the defendants.

[This case has been carried to the Judicial Committee of the Privy Council.]

MANITOBA.

In the Queen's Bench.

[THE FULL COURT, 13TH MAY, 1892.

In re DOYLE AND RURAL MUNICIPALITY OF DUFFERIN.

Municipal corporations—Local option by-law—Application to quash by-law for repeal of—"A Judge"—Persona designata.

Appeal from the decision of DUBUC, J., *ante* p. 235.

The original summons was granted by BAIN, J., under the Municipal Act, 53 V. c. 51, s. 258, which provides that a person interested may apply "to a Judge of the Court of Queen's Bench sitting in Chambers," and that "the Judge" may quash the by-law.

On the appeal being called on, the objection was taken that there was no jurisdiction in DUBUC, J., to quash the by-law, as the application was made on summons granted by BAIN, J.; that he was *persona designata*; and, therefore, there was in this case no judgment from which an appeal could lie.

Held, that the objection was fatal, and the appeal must be dismissed with costs.

Mulock, Q.C., and *Isaac Campbell*, Q.C., for the applicants.

Munson and *Wade*, for the municipality.

[BAIN, J., 25TH MAY, 1892.

REGINA v. WILLIAMS.

Liquor License Act—Summary conviction for selling during prohibited hours—No evidence that defendant held license—Power to amend defects.

Application to quash a summary conviction. The defendant was convicted for unlawfully selling liquor during prohibited hours. In the evidence returned by the justices there was nothing whatever to show that the defendant, or any one else, held a license for the premises where this liquor was sold.

Held, that the offence of selling liquor during prohibited hours was one that could be committed only in a place where intoxicating liquors were licensed to be sold, and it was incumbent on the prosecution to prove that the defendant held a license for the premises in question.

It was contended that, as the evidence for the prosecution showed that the defendant sold liquor without a license, and as he did not prove that he had a license, the prosecution should be treated as one for selling without a license, and the Court should make such amendments in the conviction as were necessary under s. 118 of the Liquor License Act, 1889, to make it one for selling without a license.

Held, that, although the section cured many defects of substance and of form, it did not go the length of enabling the Court arbitrarily to convict the defendant of an offence for which he had never been tried or called upon to answer.

The conviction must be quashed without costs, with the usual order for the protection of the justices.

Wade, for the applicant.

Davis, for the Crown.

JONES v. SIMPSON.

Real Property Act—Caveator, addition of—Estate or interest of caveator—Directions in statute imperative.

Petition under the Real Property Act. An objection was taken to the hearing of the petition on the ground that the caveat filed in the Land Titles Office was defective, first, because the addition of the caveator was not set out; and, second, because the estate or interest that the caveator claimed in the land was not sufficiently described. Section 148 of the Real Property Act, R. S. M., directs that "every caveat filed with the district registrar shall state the name and addition of the person by whom or in whose behalf the same is filed;" and in the form of caveat given in the schedule, there is the direction, "insert name and addition." The caveat gave no addition for

the caveator, but in the affidavit filed in support of it he was described as an accountant, and it was contended that as the caveat and affidavit were filed together and were intended to be read together, the affidavit might be looked at to supply the omission in the caveat.

Held, that the direction of the statute must be considered to be imperative and that no equivalent for it could be accepted.

The statement of the caveator's estate and interest in the land both in the caveat and in the affidavit was that "I have an attachment against Thomas Moodie, who owns or has a personal interest in the land described." The direction in the form of caveat in the statute is, "particularize the estate or interest claimed." The caveat must be supported by an affidavit stating the nature of the title under which the claim is made, and in the form of this affidavit the deponent is directed to "here state particulars of caveator's interest."

Held, that the statement not only failed to give any particulars of the interest that was claimed by the caveator, but it did not show that he had, or could have, any interest in the land. Assuming that the writ of attachment was issued under the Administration of Justice Act, such a writ in no way affects or binds the debtor's lands until a certificate of the writ having been issued has been registered in the proper Land Titles or Registry Office.

Petition dismissed with costs.

Ewart, Q.C., for the caveator.

Patterson, for the caveatee.

Supreme Court of Canada.

EXCHEQUER COURT.] [2ND MAY, 1892.

MORIN v. REGINAM.

Government Railway—43 V. c. 8, construction of—Damage to farm from overflow of water—Negligence—Boundary ditches—Maintenance of—Liability of Crown.

Held, affirming the judgment of the Exchequer Court, 11 Occ. N. 354, that under 43 V. c. 8, confirming the agreement of sale by the Grand Trunk Railway Company to the Crown of the Rivière du Loup branch of their railway, the Crown cannot be held liable for damages caused from the accumulation of surface water to land crossed by the railway since 1879, unless it is caused by acts or omissions of the Crown's servants; and, as the damages in the present case appeared by the evidence relied on to have been caused through the non-maintenance of the boundary ditches of claimant's farm, which the Crown was under no obligation to repair or keep open, the appellant's claim for damages must be dismissed.

Belcourt, for the appellant.

Hogg, Q.C., for the respondent.

HUMPHREY v. REGINAM.

Contract—Carriage of mails—Authority of Post Master General.

The contract for carriage of mails between St. John, N.B., and Digby, N.S., having expired, the P.O. Department advertised for tenders for a temporary service, and H. put in a tender. None of the tenders was accepted, and H., being in Ottawa, had an interview with the Post Master General, who verbally agreed

to H.'s performing the service for a time on the terms and conditions of the former contract. H. then, pursuant to directions from the Post Master General, wrote the latter a letter by which he agreed to carry the mails for a period of nine months for the amount paid under the former contract and subject as usual to cancellation at an earlier period. The amount paid for the service by the former contract was $10,000 a year, and the usual cancellation was on giving six months' notice of the intention to terminate the contract. H. procured the necessary steamers and performed the service for some two months, when he was notified that his agreement with the Department was at an end, and the carrying of the mails was transferred to a Government steamer. H. then brought an action against the Government by petition of right claiming damages for breach of contract.

Held, affirming the decision of the Exchequer Court, 2 Ex. C. R. 386, that the Post Master General had no authority to bind the Crown by a contract for a sum exceeding $1,000 without the authority of an order-in-council; and the petition must therefore be dismissed.

Pugsley, Q.C., S.-G., for the appellant.

Hogg, Q.C., for the respondent.

CHURCHILL v. McKAY.

"THE QUEBEC."

Maritime law—Salvage of ship and cargo—Principal and agents—Power of attorney—Construction—Authority to settle or adjust claim—Right to receive payment—Appeal from local Judge in Admiralty—Jurisdiction.

The ship *Quebec* was abandoned at sea by her crew and discovered by another vessel, the crew of which stopped up auger holes bored in her and brought her into port. A claim for salvage was made against the owners, and a power of attorney was given by the salvors to one P. authorising him "to bring suit or otherwise settle and adjust any claim which we may have for salvage service," etc. P. arranged with the owners the

amount of salvage for the ship due the salvors, and received payment of the same, as well as part of the salvage for the cargo, giving the owners a release of the lien of the salvors on the vessel. P. did not pay the money to the sailors, and the power of attorney was revoked before the balance of the cargo salvage was paid, and this action was brought to recover the full amount.

Held, affirming the decision of the local Judge in Admiralty for Nova Scotia, *ante* p. 248, that the authority by the power of attorney to "settle and adjust" the claim did not authorize P. to receive the money, and his release did not prevent the plaintiffs from maintaining the action.

TASCHEREAU, J., doubted the jurisdiction of the Court to hear the appeal.

W. B. Ritchie, for the appellants.

McCoy Q.C., and *Morrison*, for the respondents.

[2ND JUNE, 1892.

TOWN OF LEVIS v. REGINAM.

Appeal—Award by Exchequer Court Judge—Expropriation of land—Value of land taken.

The Supreme Court will not interfere with the award of the Judge of the Exchequer Court as to the value of land expropriated for railway purposes, where there is evidence to support his finding and such finding is not clearly erroneous.

Bethune, Q.C., for the appellants.

Angers, Q.C., for the respondent.

ONTARIO.] [2ND MAY, 1892.

KINGSTON AND BATH ROAD CO. v. CAMPBELL.

Negligence—Liability of road company—Collector of tolls—Lessee.

C. brought an action against a road company for injuries sustained from falling over a chain used to fasten a toll-gate on the company's road. On the trial the following facts were proved:—the toll-house extended to the edge of the highway, and in front of it was a short board walk; the gate was attached to a post on the opposite side of the road, and was fastened at night by a chain which was generally carried across the board walk and held by a large stone against the house. The board walk was generally used by foot passengers, and C., walking on it at night, tripped over the chain, and fell, sustaining the injuries for which the action was brought.

The toll collector was made a defendant to the action, but did not enter a defence. It was shown that he had made an agreement with the company to pay a fixed sum for the privilege of collecting the tolls for a year and was not to account for the receipts. The company claimed that he was lessee of the tolls and that they were not responsible for his acts. It was proved, however, that in using the chain to fasten the gate as he did he was only following the practice that had existed for some years previously, and doing as he had been directed by the company. The statute under which the company was incorporated contained no express authority for leasing the tolls but used the term "renter" in one section, and in another spoke of a "lease or contract" for collecting the tolls.

The company claimed also that C. had no right to use the board walk in walking along the highway, and her being there was contributory negligence on her part which relieved them from liability for the accident.

Held, affirming the decision of the Court of Appeal, 18 A.R. 286; Gwynne, J. dissenting; that C. had a right to use the board walk as part of the public highway, and was, moreover, invited by the company to use it, and there was, therefore, no contributory negligence; that whether the toll collector was servant of the company or lessee of the tolls, the company was liable for his acts, and even if they would not be liable in case he was regarded

as lessee, the previous improper use of the chain would make them so.

Britton, Q.C., for the appellants.

Lyon, for the respondent.

DUGGAN v. LONDON AND CANADIAN LOAN AND AGENCY CO.

Shares—Pledge—Transfers "in trust"—Duty of transferees to make inquiry —Redemption.

D. transferred to brokers, as security for a loan and for margins in stock speculation, 180 shares of valuable stock, the transfer expressing on its face that the stock was assigned "in trust." The brokers afterwards pledged this and other stock with a bank as security for an advance, and from time to time transferred the loan to other banks and monetary institutions, the various transfers of D.'s stock retaining the original form, namely, that of being "in trust." The brokers finally arranged a loan for a large amount with the L. & C. L. Co., to whom the stock was transferred by the then holders, the Federal Bank, by an assignment which was signed "B., manager in trust," B. being the manager of the Federal Bank. D. tendered to the London & Canadian Loan Co. the amount of his indebtedness to the brokers, and demanded his stock, which the company refused to re-transfer except upon payment of their advance to the brokers. D. then brought an action to compel the company to re-assign his stock to him.

Held, reversing the decision of the Court of Appeal, 18 A. R. 305, and restoring that of STREET, J., 19 O. R. 272; TASCHEREAU and PATTERSON, JJ., dissenting; that the company were put upon inquiry by the form of the transfer to them, as to the nature of the trust, and, not having made such inquiry, could only hold the stock subject to payment by D. of his indebtedness to the brokers.

Sweeny v. *Bank of Montreal*, 12 S. C. R. 661; 12 App. Cas. 617, followed.

Held, per TASCHEREAU and PATTERSON, JJ., that the form of the transfer to the company signed "B., manager in trust" only indicated that B. held the stock in trust for his bank, and that an inquiry as to the nature of the trust was not obligatory on the company, even if the same would have been possible in view of the shares not being numbered or otherwise identified so that they could be traced.

McCarthy, Q.C., and *J. K. Kerr*, Q.C., for the appellant.

E. Blake, Q.C., and *Howland*, for the respondents

UTTERSON LUMBER CO. v. RENNIE.

Mortgage—Rectification—Property not included—Evidence.

A mortgage was given to R. of certain lots of land described by numbers, in front of which was a water lot with a saw mill and machinery thereon. The mortgagors afterwards assigned their property for the benefit of creditors, and it was sold at auction to a number of persons who afterwards became incorporated as the appellant company. After the sale and before the deed was executed in pursuance thereof, the respondent, as he alleged, first became aware that the mortgage did not cover the saw mill and machinery, as had been intended, and he commenced this action and registered a *lis pendens*. On the trial evidence was given of notice to some of the persons forming the company that the respondent so claimed, and the trial Judge found that the appellants were not *bona fide* purchasers for value without notice, and gave judgment reforming the mortgage as asked. This decision was affirmed by the Court of Appeal.

Held, GWYNNE and PATTERSON, JJ., dissenting, that there was ample evidence to sustain the finding that the mill and machinery were intended to be included in the mortgage and were omitted by mutual mistake; and the appeal should, therefore, be dismissed.

Laidlaw, Q.C., for the appellants.

G. T. Blackstock and *R. A. Dickson*, for the respondent.

GIBBONS v. McDONALD.

Assignments and preferences—Mortgage—Preference by—Pressure—R. S. O. c. 124, s. 2.

M. was indebted to McD. on certain promissory notes, and, wishing to go to Manitoba to live, he proposed to give McD. a mortgage on his farm for the amount of the notes and a further advance of money, which was done. McD. has previously demanded payment of the notes. At the time of giving the mortgage, M. knew that he was unable to pay his debts in full, but McD. believed him to be solvent. M. afterwards executed an assignment for the general benefit of his creditors, and the assignee brought an action to set aside the mortgage to McD. as being given with intent to defeat, delay, or prejudice the other creditors of M.

Held, affirming the decision of the Court of Appeal, 18 A. R. 159, and that of STREET, J., 19 O. R. 290, that the mortgage having been given as the result of pressure and for a *bona fide* debt, and McD. not having been aware that M. was insolvent, the mortgage was not void.

Molsons' Bank v. *Halter*, 18 S. C. R. 88, and *Stephens* v. *McArthur*, 19 S. C. R. 446, followed.

Garrow, Q.C., for the appellant.

Lash, Q.C., and *J. H. Macdonald*, Q.C., for the respondents.

[17TH JUNE, 1892.

McGUGAN v. SMITH.

Contract—Agreement for service—Specific performance—Remuneration for services—Quantum meruit.

S., with the consent of her parents, went to live with her grandfather when she was eleven years old, and some three years after, the grandfather agreed that if she would remain with him until he died, or until her marriage, he would provide for her by his will as amply as for any of his daughters. She lived with

him until she was twenty-five, when she was married, performing all the time such services as tending cattle, cleaning out stables, breaking in unmanageable horses, doing field work, and other things usually done by a man. About a year after her marriage her grandfather died, leaving her by his will $400, a sum much less than his daughters received. She brought an action against the executors of the estate for specific performance of the agreement, or, in the alternative, for wages for the time she worked for the testator.

Held, affirming the judgment of the Court of Appeal, that S. was entitled to payment for her services, and that $1,000 was a reasonable amount to remunerate her therefor, and she was entitled to judgment for that amount, which was to include the $400 left to her by the will.

Held, also, that the agreement made with S. by her grandfather was not one of which the Court would decree specific performance.

J. M. Glenn, for the appellants.

John A. Robinson, for the respondent.

[20TH JUNE, 1892.

McGUGAN v. McGUGAN.

Appeal—Jurisdiction—Proceeding originating before Judge in Chambers—Solicitor and client—Order for taxation of costs—Party chargeable—Ratepayer—R. S. O. c. 147, s. 42.

By R. S. O. c. 147, s. 42, any person who, not being chargeable as the principal party, is liable to pay or has paid any bill of costs to a solicitor, is entitled to apply for an order for taxation of such bill; and such application may be made to a County Court Judge, or a Judge of the High Court, in Chambers. M., a ratepayer of a school section, applied to a Judge of the High Court for an order to tax a bill rendered to and paid by the school trustees. His application was refused, and he appealed to a Divisional Court, where the order for taxation was made: 21 O. R. 289. An appeal was taken to the Court of Appeal, where the judgment of the Divisional Court was reversed: 19 A. R. 56.

M. sought to appeal to the Supreme Court.

Held, that the appeal could not be entertained.

Per RITCHIE, C.J., and STRONG, J.—Even if this Court has jurisdiction to hear this appeal, and if it was not a matter of discretion in the Court of Appeal to hear it or not, we should not interfere in a matter of taxation of costs. Moreover, on the merits, the ratepayer was not a person entitled to an order for taxation.

Per TASCHEREAU, J.—The judgment sought to be appealed from is not a final judgment under the Supreme Court Act. It was a matter of discretion for the Court of Appeal to entertain the appeal from the Divisional Court or not; and the proceedings did not originate in a Superior Court. For all these reasons the appeal should be quashed.

Per GWYNNE, J.—Whether we have jurisdiction to hear the appeal or not, the matter is one in which this Court should not interfere.

Per PATTERSON, J.—The order in this case was one which the Court had a discretion to make or refuse, and so it is not appealable to this Court.

W. R. Riddell and *John A. Robinson*, for the appellants.

J. M. Glenn, for the respondents.

QUEBEC.] [2ND MAY, 1892.

HATHAWAY v. CHAPLIN.

Evidence—Letter of guaranty by bank—Claim for loss—Proof of claim—Account sales.

H. *et al.*, upon receipt of an order by telegram from the Exchange Bank to load cattle on a steamer for M. S., with guaranty against loss, shipped, three days after the suspension of the bank, some cattle and consigned them to their own agent at Liverpool. Subsequently they filed a claim with the liquidators of the bank for an alleged loss of $7,965 on the shipments, and the claim being contested, the only witness they adduced at the trial was one of their employees, who knew nothing personally about what the cattle realized, but put in account sales received by mail as evidence of loss.

Held, affirming the judgment of the Court below, that assuming that there was a valid guaranty given by the bank, upon which the Court did not express any opinion, the evidence as to the alleged loss was insufficient to entitle H. *et al.* to recover.

Per TASCHEREAU, J.—That the guaranty was subject to a delivery of the cattle to M. S., and that H. *et al.*, having shipped the cattle in their own name, could not recovery on the guaranty.

Laflamme, Q.C., and *Brown*, for the appellants.

Macmaster, Q.C., and *Greenshields*, for the respondent.

[3RD MAY, 1892.

In re L'ASSOMPTION DOMINION ELECTION.

Election appeal—Discontinuance—Effect of— Certificate of registrar—New writ.

By a judgment of the Superior Court in the matter of the Controverted Election for the Electoral District of L'Assomption, the respondent was unseated by reason of corrupt acts committed by agents, and appealed to the Supreme Court. The case was inscribed for hearing for the May session of 1892. When the appeal was called, no one appearing for the appellant, counsel for the respondent stated that he had been served by the appellant's solicitor with a notice of discontinuance.

Held, that the appeal should be struck off the list.

The notice of discontinuance having been filed in the registrar's office, the Registrar certified to the Speaker of the House of Commons that by reason of such discontinuance the decision of the trial Judges and their report were left unaffected by the proceedings taken in the Supreme Court.

The Speaker subsequently issued a new writ for the electoral district.

R. G. Code, for the respondent.

In re BAGOT DOMINION ELECTION.

In re ROUVILLE DOMINION ELECTION.

Election petition—Judgment voiding election—Trial—Commencement of—Six months' limit—Consent to reversal of judgment—R. S. C. c. 135, s. 52.

In these two cases the trials were commenced on the 22nd December, 1891, more than six months after the filing of the petitions, and subject to the objection taken by the respondents that the Court had no jurisdiction, more than six months having elapsed since the filing of the petitions. No orders were made enlarging the time for the commencement of the trials, and the respondents consented that their elections be voided by reason of corrupt acts committed by their agents without their knowledge.

On appeal to the Supreme Court upon the question of jurisdiction, the petitioners' counsel signed and filed a consent to the reversal of the judgment appealed from without costs, admitting that the objection was well taken.

Held, that upon the filing of an affidavit as to the facts stated in the respondent's consent, the appeals should be allowed and the election petitions dismissed without costs: R. S. C. c. 135, s. 52.

A. Ferguson, Q.C., for the appellant in the first case.

Belcourt, for the respondent.

Belcourt, for the appellant in the second case.

R. G. Code, for the respondent.

[9TH MAY, 1892.

In re PONTIAC DOMINION ELECTION.

Election petition—Judgment—Enlargement of time for commencement of trial—Notice of trial—Shorthand writer's notes—Appeal—R. S. C. c. 9, ss. 31, 33, 43, 50 (b).

The judgment appealed from did not contain any special findings of fact or any statement that any of the two hundred charges mentioned in the particulars were found proved, but stated generally that corrupt acts had been committed by the respondent's agents without his knowledge, and declared that he had not been duly elected, and that the election was void.

On an appeal to the Supreme Court on the ground that the judgment was too general and vague :—

Held, that the general finding that corrupt acts had been proved was a sufficient compliance with the terms of R. S. C. c. 9, s. 43.

On the 10th October, 1891, the Judge, within six months after the filing of the election petition, by order enlarged the time for commencement of the trial to the 4th November, the six months expiring on the 18th October. On the 19th October another order was made by the Judge fixing the date of the trial for the 4th November, 1891. The respondent objected to the jurisdiction of the Court.

Held, that the orders made were valid: ss. 31, 33, c. 9, R. S. C.

Held, also, 1. that the objection to the insufficiency of the notice of trial given in this case under s. 31 of c. 9, R. S. C., was not an objection which could be relied on in an appeal under s. 50 (b) of c. 9, R. S. C.

2. That evidence taken by a shorthand writer not an official stenographer of the Court, but who has been sworn and appointed by the Judge, need not be read over to the witnesses when extended.

O'Gara, Q.C., and *Aylen*, for the appellant.

McDougall, for the respondent.

[2ND JUNE, 1892.

FLATT v. FERLAND.

Appeal—Jurisdiction—R. S. C. c. 135, s. 29—Fraudulent conveyance—Action to set aside, by a creditor—Amount in controversy—Appeal—Jurisdiction.

In December, 1889, F. a trader, sold to G., the respondent, certain land in Montreal, which was mortgaged for $7,000, for $8,000, with a right of redemption for one year.

In January, 1890, F. made an assignment, and I. F. *et al.*, creditors of F. in the sum of $1,880, brought an action against G. to have the deed of sale of the property, which was valued at over $11,000, set aside as made in fraud of his creditors. G. pleaded that he was willing to return the property

upon payment of the sum of $1,000 which he had advanced to F., and the Courts below dismissed the action of I. F. *et al.*

On appeal to the Supreme Court of Canada :—

Held, that as the appellants' claim was under $2,000 and they did not represent F.'s creditors, the amount in controversy was insufficient to make the case appealable: R. S. C. c. 135, s. 29.

The appeal was quashed with costs.

Belcourt, for the respondent.

Brosseau, for the appellants.

NOVA SCOTIA.] [2ND MAY, 1892.

PEERS v. ELLIOTT.

Negligence—Charge to jury—Misdirection—New trial.

P. a farmer, having a quantity of hay on his farm, agreed with F. to have it pressed by his (F.'s) steam engine, and in the course of the work the barn of P. was set on fire by sparks, as he alleged, from the engine, and was burned with its contents. P. brought an action to recover damages for his loss, alleging negligence against E. both in the construction and management of the engine. On the trial the main issue was whether or not the spark arrester, which it was shown E. possessed in connection with the engine, was in its place when the fire occurred, and the Judge directed the jury that if there was no spark arrester, that in itself would be such evidence of negligence as would entitle the plaintiff to recover. A verdict was given for the plaintiff, which the full Court set aside for misdirection by the trial Judge in so charging the jury.

Held, that the Judge had misdirected the jury in telling them that the want of a spark arrester was negligence in point of law, and it could not be said that the jury were not influenced by it in giving their verdict. A new trial was therefore properly granted.

Dickie, Q.C., for the appellant.

W. B. Ritchie, for the respondent.

MUNICIPALITY OF LUNENBURG v. ATTORNEY-GENERAL FOR NOVA SCOTIA.

Municipal corporations—Maintenance of county buildings—Establishment of county court house and gaol—Right to remove from shire town.

The county of Lunenburgh, N. S., contains the municipality of C. and the town of L., which are corporations separate and distinct from the municipality of the county. L. is the shire town of the county and contains the county court house and gaol, and the sittings of the Supreme Court for the county are required to be held there. By R. S. N. S., 5th ser., c. 20, s. 1, as amended by 49 V. c. 11, "County or district gaols, court houses, and sessions houses may be established, erected, and repaired by order of the municipal councils in the respective municipalities."

In 1891 an Act was passed by the legislature of Nova Scotia empowering the municipality of L. to borrow money for the purpose of erecting and furnishing a court house and goal in the county, or repairing and improving the present court house. The municipality of C. and the town of L. were respectively to contribute towards payment of this loan. The municipality by resolution proposed to erect the buildings in B., another town in the county, and an injunction was granted by the Supreme Court of Nova Scotia restraining the municipal council from erecting a court house for the general purposes of the county at B. or from expending in such erection any funds in which the municipality of C. and the town of L., or either of them, were interested.

On appeal from the judgment granting such injunction :—

Held, that without direct legislative authority the court house and gaol for the purposes of the county could only be situated at the shire town ; that the authority in the municipal council to establish these buildings did not allow their erection in any other place, which would, in effect, repeal and annul the Acts of the legislature providing for their establishment in L., the shire town ; and that the injunction was properly issued and must be maintained.

W. B. Ritchie, for the appellants.

Russell, Q.C., for the respondents.

PEOPLES BANK OF HALIFAX v. JOHNSON.

Contract—Consideration—Stifling prosecution.

L. was a member of the firm of H. & A. L., doing business at Lockport, N.S., and also local agent of a bank in that town. As such agent he had embezzled the bank's money, and the cashier of the bank obtained a bond from J., whose adopted daughter was the wife of L., agreeing to pay the bank the indebtedness of the firm. In an action against J. on the bond, the defence was that it had been given in consequence of threats by the cashier to prosecute L. for the embezzlement, and was therefore void.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that the evidence established that the only consideration for the bond was to prevent the prosecution, and such consideration being illegal, the bond was void.

Ross, Q.C., for the appellant.

Drysdale, for the respondent.

CITY OF HALIFAX v. LORDLY.

Municipal corporations—Duty to light streets—Liability for negligence—Obstruction on sidewalk—Position of hydrant.

L. was walking along the sidewalk of a street in Halifax at night, when an electric lamp went out, and in the darkness she fell over a hydrant and was injured. In an action against the city corporation for damages it was shown that there was a space of seven or eight feet between the hydrant and the inner line of the sidewalk, and that L. was aware of the position of the hydrant and accustomed to walk on that street. The statutes respecting the government of the city do not oblige the council to keep the streets lighted, but authorize them to enter into contracts for that purpose. At the time of this accident the city was lighted by electricity by a company who had contracted with the corporation therefor. Evidence was given to show that it was not possible to prevent a single lamp or a batch of lamps going out at times.

Held, reversing the judgment of the Court below; STRONG and TASCHEREAU, JJ., dissenting; that the city was not liable; that the corporation being under no statutory duty to light the streets, the relation between it and the contractors was not that of master and servant or principal and agent but that of employer and independent contractors, and the corporation was not liable for negligence in the performance of the service; that the position of the hydrant was not in itself evidence of negligence in the corporation; and that L. could have avoided the accident by the exercise of reasonable care.

MacCoy, Q.C., for the appellants.

Drysdale, for the respondent.

[10TH MAY, 1892.

In re CAHAN.

Appeal—Jurisdiction—Security for costs—Final judgment—Admission of attorney to practise.

C. applied to the Supreme Court of Nova Scotia to be admitted an attorney of that Court, presenting to the Court a certificate from the President of the Dalhousie Law School of his having taken the degree of LL.B. at that school, and claiming that the Act of the Nova Scotia Legislature 54 V. c. 22, which made certain provisions respecting the admission of graduates of the Law School to the bar of the Province, had done away, so far as such graduates were concerned, with certain conditions required to be performed by persons desiring admission to practise law. The Supreme Court of Nova Scotia held that graduates of the Law School were still obliged to perform these conditions, and refused the application. C. sought to appeal to the Supreme Court of Canada, but gave no security for the costs of such appeal, his application not having been opposed, and there being no person to whom such security could be given.

Held, GWYNNE, J., doubting, that the Court had no jurisdiction to hear the appeal.

Per RITCHIE, C.J., and TASCHEREAU, J., that giving security for costs is a condition precedent to every appeal to this Court, and without it the Court has no jurisdiction.

Per STRONG, J., that it was never intended that the Supreme Court should interfere in matters relating to the admission of attorneys and barristers in the different Provinces, and on that ground the appeal would not lie.

Per TASCHEREAU and PATTERSON, JJ., that the judgment sought to be appealed from was not a final judgment within the meaning of the Supreme Court Act.

The appeal was quashed.

Russell, Q.C., for the appellant.

NEW BRUNSWICK.] [2ND MAY, 1892.

CITY OF ST. JOHN v. CHRISTIE.

Municipal corporations—Control over streets—Duty to repair—Transferred powers—Negligence—Notice of action—Defence of want of—34 V. c. 11 (N. B.)—25 V. c. 16 (N. B.).

The Act incorporating the town of Portland, 34 V. c. 11 (N. B.), gave the town council the exclusive management of and control over the streets and power to pass by-laws for making, repairing, etc., the same. By section 84 the provisions of 25 V. c. 16, and amending Acts relating to highways, apply to that town, and the powers, authorities, rights, privileges, and immunities vested in commissioners and surveyors of roads in the town are declared to be vested in the council. By another Act no action could be brought against a commissioner of roads, unless within three months after the act committed and on one month's previous notice in writing. The town of Portland afterwards became the city of Portland, subject to these provisions, and eventually a part of the city of St. John.

An action was brought against the city of Portland by C. for injuries sustained by stepping on a rotten plank in a sidewalk in that city and breaking his leg. No notice of action was given by C. The jury on the trial found that the broken plank was within the line of the street and that the council, by conduct, had invited the public to use the sidewalk. After Portland became a part of St. John, the latter city became defendants in the case for subsequent proceedings.

Held, STRONG, J., dissenting, that the city corporation were liable to C. for the injuries so sustained.

Held, *per* RITCHIE, C.J., that if notice of action was necessary, the want of it could not be relied on as a defence without being pleaded, which was not done.

Per TASCHEREAU, GWYNNE, and PATTERSON, JJ., that notice was not necessary; the liability of the city did not depend on s. 84 of 34 V. c. 11, but on the sections making it the duty of the council to keep the streets in repair; that the only powers and authorities vested in commissioners and surveyors of roads were those relating to the performance of statute labour; and the section was unnecessary.

Per STRONG, J., that one of the privileges or immunities declared to be vested in the council was that of not being subject to an action without prior notice, and no notice having been given in this case, C. could not recover.

Jack, Q.C., for the appellants.

Pugsley, for the respondent.

NEW BRUNSWICK.] [16TH MAY, 1892.

AYR AMERICAN PLOUGH CO. v. WALLACE.

Promissory note—Form of—Indorsement by party not named—Liability as maker.

The agent of the plaintiffs required security from a customer for goods sold, and went with the customer to the office of W., who was proposed as such security. W. agreed to become security, and was proceeding to write out promissory notes for the customer to sign, when the agent requested that the notes should

be drawn on a form supplied to him by his principals, which was done, the customer signing such notes of which the plaintiffs were payees. W. wrote his name across the back. The notes were not paid and no notice of dishonour was given to W., but an action was brought against him and the customer as joint-makers. On the trial the agent swore that he never asked the customer for an indorser but only for security; that he was accustomed to take joint notes in such cases; and that he supposed he was getting joint notes in this case. W. swore that he was asked to indorse and only intended to indorse. A nonsuit was entered, with leave reserved to the plaintiffs to move for judgment "if there is any evidence that should be left to the jury as to W.'s liability." The motion for judgment was refused.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the evidence showed that W. only intended to become indorser of the notes and there was no evidence to go to the jury of his intention to be a maker. The nonsuit was right therefore and should be maintained.

Earle, Q.C., for the appellants.

Currey, for the respondent.

SCOTT v. BANK OF NEW BRUNSWICK.

Appeal—New trial—Verdict against weight of evidence—Interference with.

S. brought an action against the bank to recover money deposited on a special receipt, and the defence to the action was that the money had been paid to an agent of S. On the trial S. swore that after he got the deposit receipt from the bank he handed it to one R. for safe keeping while he was at sea, and that he had never indorsed it. It was shown that some time afterwards R. presented the receipt at the bank with the name of S. indorsed thereon and obtained the amount of the deposit with interest. When S. returned he found that R. had so used the receipt and he afterwards took from him a mortgage for a larger amount than his deposit with the bank. The jury found

that the name of S. was forged to the receipt and that the mortgage given to S. did not include the amount claimed from the bank. A verdict was given for S., which was set aside as being against the weight of evidence, and a new trial was granted; from which S. appealed.

Held, that the Supreme Court would not interfere with the order for a new trial, granted on the ground that the verdict was against the weight of evidence.

Palmer, Q.C., for the appellant.

Barker, Q.C., for the respondents.

MANITOBA.]

McMICKEN v. ONTARIO BANK.

Deed—Rectification—Absolute in form but intended to be a mortgage—Evidence of intention—Character of.

A. M. conveyed to G. M. certain lands under lease to the Ontario Bank, and on 1st September, 1877, G. M. conveyed these lands to the plaintiff, wife of A. M., but the deed was not registered until 1st October. On 17th September G. M. executed a mortgage of the lands to the bank, who filed a bill against G. M. to foreclose such mortgage, but a year later, when about to issue the final decree of foreclosure, they for the first time became aware of the transfer to the plaintiff, and they abandoned the foreclosure proceedings and filed a new bill against the plaintiff. As the lease of the premises to the bank would expire before they could obtain possession of the land in this last mentioned suit, negotiations were had with the plaintiff, as a result of which she and her husband executed an absolute deed of the land to the bank, which was the deed sought to be impeached in this suit.

The plaintiff brought a suit to have it declared that this deed was only intended to operate as a mortgage, and asked to be allowed to redeem and to have an account of the profits. The evidence on the hearing showed that A. M., the plaintiff's husband, was indebted to the bank in the sum of $12,700, and G. M. also owed the bank as surety for A. M. The consideration of the deed was the extinguishment of these debts. The

plaintiff claimed, however, that there was a parol agreement that the deed should only have the effect of a mortgage, and that the bank took the lands in trust to sell and pay off these claims and return her the surplus. The bank claimed that the transaction was a final transfer of the lands to extinguish the two debts and nothing more.

The trial Judge, DUBUC, J., held that plaintiff had not given evidence sufficient to justify him in granting her the relief she claimed, and dismissed the bill. The plaintiff obtained a rehearing before TAYLOR, C.J., and DUBUC, J., (BAIN and KILLAM, JJ., having been engaged in the case while at the bar) who affirmed the previous decision.

On appeal to the Supreme Court of Canada:—

Held, that to induce the Court to grant the relief asked for in this case the evidence of intention that the deed was to operate as a mortgage only must be of the clearest, most conclusive, and unquestionable character, and the plaintiff having failed to produce such evidence, her bill was rightly dismissed.

Hagel, Q.C., and *Kennedy*, Q.C., for the appellants.

McCarthy, Q.C., and *A. E. Richards*, for the respondents.

BRITISH COLUMBIA.]

CITY OF NEW WESTMINSTER v. BRIGHOUSE.

Municipal corporations—Repair of streets—Excavation—Injury to adjoining land—By-law—Expropriation—Land injuriously affected—51 V. c. 42, s. 190 (B.C.)—Negligence.

A by-law authorized the corporation of the City of New Westminster to raise money for the purpose of making repairs on certain streets, but there was no by-law expressly authorizing such repairs, which were, however, proceeded with. One of the streets named in the by-law was excavated to lower the grade, in the execution of which work the soil of an adjoining lot fell into the excavation, and the supports of the buildings thereon became weakened. The owner of such adjoining lot brought an action against the corporation for the damages occasioned to his land by such excavation.

By the Act of incorporation of the city, 51 V. c. 42, s. 190, the council may, by by-law, order the opening or extending of streets, etc., and may purchase, acquire, take, and enter into any lands required therefor, either by private contract or by complying with certain formalities prescribed by s. 190. The formalities are set out in s-ss. 3 and 4 of that section, providing for the appointment of commissioners to value the land to be taken. By s-s. 14 the report of the commissioners is to be submitted to the Supreme Court or a Judge thereof or a County Court Judge for confirmation, and by s-s. 15 the council of the city is to deposit with the registrar or clerk of the Court the value fixed by such report, such deposit constituting a legal title in the city to the land.

By s-s. 17 of s. 190, s-ss. 3 and 4 are extended to all cases in which it shall become necessary to ascertain the amount of compensation to be paid to any owner of land for damage sustained by reason of any alteration made by order of the council in the line of level of any street, etc., and the amount of such compensation is to be paid at once without further formality.

Held, affirming the decision of the Supreme Court of British Columbia; RITCHIE, C.J., and TASCHEREAU, J., dissenting; that s-s. 17 of s. 190 applies only to lands injuriously affected by work on the streets, and not to land taken or used for the purposes of such work; and that in order to acquire, take, or use lands for such purpose the council must be authorized by by-law and comply with the formalities prescribed by s-ss. 3, 4, 14, and 15 of that section; that the soil of the plaintiff's lot having fallen into the excavation made in the street, it must be regarded as lands taken and used for the purposes of such excavation, equally as it would have been if the street had been elevated so as to cover a portion of the adjoining land; that the corporation had, therefore, taken and used the plaintiff's land without complying with the conditions precedent therefor prescribed, and were liable to the plaintiff in an action for the damage he had sustained.

Held, further, that excavating the street to such a depth as to cause the soil of the adjoining lot to fall into the excavation was such negligence in the execution of the work as to make the corporation liable.

Robinson, Q.C., for the appellants.

Osler, Q.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q.B.D.] [10TH MAY, 1892.

MINGEAUD v. PACKER.

Life insurance—Benefit society—Appointment—Revocation—Trust— R. S. O. c. 136—R. S. O. c. 172—51 V. c. 22.

This was an appeal by the plaintiff from the judgment of the Queen's Bench Division, reported 21 O. R. 267.

The plaintiff was the second wife of a person whose life was insured in a benefit society, incorporated under R. S. O. 1877, c. 167, as amended by 41 V. c. 8, s. 18, now R. S. O. c. 172. On the 28th of January, 1888, being then a widower, he obtained a benefit certificate from the society by which the insurance was made payable to his children. After this he married the plaintiff, and on the 1st of June, 1889, a new certificate was at his request issued by which the insurance was made payable to the plaintiff, and he died shortly afterwards.

The appeal came on to be heard before this Court on the 9th and 10th of March, 1892.

N. F. Patterson, Q.C., for the appellant.

C. J. Holman and *D. B. Simpson*, for the respondents.

The Court was equally divided, and the appeal was dismissed with costs.

Per HAGARTY, C.J.O., and BURTON, J.A., affirming the judgment of the Queen's Bench Division:—The effect of 51 V. c. 22, was to make the first certificate subject to the provisions of R. S. O. c. 136, ss. 5 and 6, and it was thus a trust in favour of the children, and was not revoked by the second certificate.

CH. D.]

HAYES v. ELMSLEY.

Vendor and purchaser—Specific performance—Interest—Rescission.

This was an appeal by the plaintiff and a cross-appeal by the defendant from the judgment of the Chancery Divisional Court, reported 21 O. R. 562, and came on to be heard before this Court on the 23rd of March, 1892.

J. A. Donovan, for the plaintiff.

W. Cassels, Q.C., and *D. T. Symons*, for the defendant.

The appeal was dismissed with costs, the Court agreeing with the reasons for judgment in the Court below.

The cross-appeal, which was brought against that part of the judgment refusing to allow interest from the 19th of February, 1890, to the 10th of March, 1891, during which time the judgment for rescission was in force, was also dismissed with costs, the Court being equally divided as to it.

WRIGHT v. COLLIER.

Evidence—Experts—New trial—Rule 207.

An action for damages caused by collision between two vessels was tried by ROSE, J., without a jury, and after the evidence had been taken, the learned Judge, with the consent of both parties, consulted two master mariners, and adopted as his own their opinion, based on a consideration of conflicting testimony, as to the responsibility for the collision.

Held, that this was a delegation of the judicial functions; and a new trial was ordered.

The scope of Rule 207, as to calling in the assistance of experts, considered.

C. J. Holman, for the appellants.

Alcorn, Q.C., for the respondent.

HALL v. HALL.

Donatio mortis causa—Delivery of keys of box and of rooms.

This was an appeal by the plaintiff from the judgment of the Chancery Divisional Court, reported 20 O. R. 684, reversing the judgment of ROSE, J., at the trial, in her favour, reported 20 O. R. 168.

The action was brought to establish an alleged *donatio mortis causa* of the contents of a cash box and of two rooms. The deceased, shortly before his death, handed to the plaintiff, with words of gift, his watch and pocket book, and also the keys of his cash box, which was at the time in the custody of his solicitors, and contained various title deeds and securities, and the keys of two rooms, not in the house where the deceased at the time was.

The appeal came on to be heard before this Court on the 18th and 21st of March, 1892.

S. H Blake, Q.C., for the appellant.

Bicknell and *Gauld*, for the respondents.

The Court, with great regret, dismissed the appeal, for substantially the reasons given in the judgments below; the costs of all parties to be paid out of the estate.

The following cases, in addition to those cited below, were referred to:—*Mustapha* v. *Williams*, 8 Times L. R. 160; *Wildish* v. *Fowler*, ib. 457.

VINEBERG v. GUARDIAN FIRE ASSURANCE CO.

Arbitration and award—Interest of arbitrator—Valuation—Fire insurance—R. S. O. c. 167, s. 114 (16).

Proceedings under R. S. O. c. 167, s. 114 (16) for the ascertainment of the amount of a loss are proceedings in the nature of an arbitration and not of a valuation merely.

Arbitrators must be absolutely impartial; and an award made by arbitrators, one of whom had acted to only a very small extent as agent for an agent of the defendants in obtaining risks, was, affirming the judgment of ROSE, J., at the trial, and of FERGUSON, J., in the Divisional Court, held void.

S. H. Blake, Q.C., for the appellants.

Moss, Q.C., for the respondent.

JONES v. MACDONALD.

Appeal bond—Disallowance of—Re-filing of, without consent of sureties—Insufficiency of surety—Evidence of—Sworn admissions in another action—Leave to appeal—Merits—Discretion—Interlocutory appeal.

A bond was filed by the defendant for the purposes of an appeal to the Court of Appeal. Leave to appeal was, however, necessary, and had not been obtained before filing the bond, which was, therefore, on the 4th April, 1891, disallowed. Leave to appeal was afterwards obtained, and the same bond was on the 18th September, 1891, refiled without the consent of the sureties, and was again disallowed.

Held, rightly so; for the sureties might object that the bond had been improperly used by the defendant; and the respondent was entitled to a security free from any objections of that nature.

The plaintiff objected to the bond on the ground of the insufficiency of one of the sureties, and in support of that objection read the sworn statements of such surety in another action.

Held, that such statements were admissible against the defendant who was putting forward the surety as a person of substance.

Leave to appeal refused on the merits, and also as a matter of discretion where the proposed appeal was upon an interlocutory proceeding in the course of another appeal.

H. L. Drayton, for the plaintiff.

The defendant, in person.

GALT, C.J.]

In re HUSON AND TOWNSHIP OF SOUTH NORWICH.

Municipal corporations—Local option by-law—Publication—Polling places—Quashing—Discretion.

Notice of intention to submit a local option by-law to the votes of the township electors was given in proper form and for the requisite number of times in a newspaper published in an incorporated village, the bounds of which did not actually touch, though they came close to, those of the township in question.

This paper was the nearest paper; it had a large circulation in the township; and was that in which the township council had been in the habit of publishing their notices and by-laws. No paper was published in the adjoining municipality.

One of the polling places was described merely as being "at or near" a certain village. It was shown that this village was a very small one and that the description was the same as that used in the by-laws appointing the places for holding municipal elections. It was also shown that the poll was held in a place close to that in which the poll had been held in the next preceding election, that place itself having been destroyed.

Another polling place was specifically described by place, lot, and concession, but there was an error in the number of the concession.

It was shown that all the proceedings had been taken in good faith and that no one had been misled by any of these informalities.

Held, therefore, reversing the judgment of GALT, C.J., that the Court might, in the exercise of its discretionary power so to do, refuse to quash the by-law in question.

Titus, for the appellants.

Du Vernet, for the respondents.

VILLAGE OF BRIGHTON v. AUSTON.

Damages—Municipal corporations—Bonus—Repayment—Consideration.

The plaintiffs agreed to give to the defendants a bonus of $1,000 in five equal consecutive annual instalments of $200 each, in consideration of their establishing a factory and working it for ten years. The agreement provided that the annual payments were to cease if the defendants ceased to carry on business within five years, but there was nothing in the agreement as to cesser after that time. The defendants carried on business for six years, obtained the full amount of the bonus, and then closed their factory. It was admitted that no specific damages could be proved.

Held, that the plaintiffs were not entitled to repayment of four-tenths of the bonus, as upon a failure of consideration, but that they were entitled to nominal damages at least, and, under the circumstances, to the costs of the action.

Judgment of GALT, C.J., affirmed; MACLENNAN, J.A., dissenting.

W. R. Riddell, for the appellants.

Fullerton, Q.C., and *Holland*, for the respondents.

FERGUSON, J.]

PLATT v. GRAND TRUNK RAILWAY COMPANY.

Covenant for title—Breach—Damages—Easement.

The defendants granted to the plaintiff, with covenants for title under the Short Forms Act, certain lands with the right and easement of erecting a dam at a certain spot. It was afterwards held that they had no power to grant such a right, but it was shown that it was not, in any event, practicable to maintain a dam at the spot in question.

Held, that the defendants were not liable to repay the full purchase money, less the actual value of the land without the supposed right, but only the actual practical value of the supposed right, which was nothing.

Judgment of FERGUSON, J., affirmed; OSLER, J.A., dissenting.

Shepley, Q.C., and *M. G. Cameron*, for the appellants.

S. H. Blake, Q.C., and *W. Cassels*, Q.C., for the respondents.

STREET, J.]

FLEMING v. CITY OF TORONTO.

Municipal corporations—Local improvements—By-law.

A general by-law may be passed providing the means of ascertaining and determining what real property will be immediately benefitted by any proposed work or assessment, the whole cost of which is to be assessed upon that property; but such a general

by-law is not sufficient in the case of local improvements or construction of bridges, the whole cost of which the council deem it inequitable to raise by local special assessment.

Judgment of STREET, J., 20 O. R. 547, affirmed.

E. D. Armour, Q.C., for the appellants.

Moss, Q.C., and *Coatsworth*, for the respondents.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[FERGUSON, J., 28TH MAY, 1892.

GRAY v. RICHMOND.

Will—Devise—Direction to devisee to pay legacies—Charge on land—Registration of will—Notice—Priority of legatees over mortgagees—R. S. O. c. 110, ss. 8, 22.

A testator by his will devised land to his son James subject to the payment of an annuity to his widow for her life after the expiration of a lease given by the testator, and directed his executors to apply the rent derived from the land so devised in payment of an incumbrance thereon, "so that my son may have the said property at the expiration of the said lease free from all incumbrance"; and he then directed that his son James should pay one-half of the sums thereinafter bequeathed to each of his daughters, as soon as his son Daniel should attain the age of twenty-one. To Daniel he devised other land, and directed him also to pay one-half of the bequests to the daughters. Then followed the bequests to his daughters, with names and amounts, to be paid to them in equal shares by his sons James and Daniel on the latter attaining the age of twenty-one. The will was entirely silent as to debts of the testator.

James adopted the devise to him, took possession of the land, and dealt with it as his property for many years.

Held, that the one-half of the legacies to the daughters was charged upon the land devised to James.

Robson v. *Jardine*, 22 Gr. 424, followed.

The will was duly registered prior to the dates or registry of certain mortgages created by James upon the land devised to him.

Held, that the mortgagees must be taken to have had, at the time of advancing their moneys, full notice of the will and its contents; and were bound to see to the application of their moneys; and not having done so, that the legatees were entitled to priority.

Held, also, that that part of s. 22 of R. S. O. c. 110, which provides that the four preceding sections "shall not extend to a devise to any person or persons in fee or in tail or for the testator's whole estate or interest charged with debts or legacies," does not apply only to the cases of wills coming into operation before the 18th September, 1865, but is of general application, and applies to this case.

Held, lastly, that s. 8 of R. S. O. c. 110 (s. 15 of R. S. O. c. 102) does not apply to this case, because the money was not money payable upon an express or implied trust, or for a limited purpose, within the meaning of the section.

McMillan v. *McMillan*, 21 Gr. 594, and *Moore* v. *Mellish*, 8 O. R. 174, distinguished.

Atkinson, Q.C., for the plaintiffs.

M. Wilson, Q.C., and *Pegley*, Q.C., for the defendants.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 6TH JUNE, 1892.

In re SOUTH PERTH DOMINION ELECTION.

ELLIS v. PRIDHAM.

PRIDHAM v. TROW.

Elections—Trial of petition—Session of Parliament—R. S. C. c. 9, s. 32.

A petition was filed by Ellis against Pridham, the sitting member; and a cross-petition by Pridham against Trow, who had been a candidate at the election.

During the session of Parliament a motion was made on behalf of Pridham to have a time and place fixed for the trial of the petition and cross-petition.

The motion came before the Divisional Court, composed of Boyd, C., and ROBERTSON and MEREDITH, JJ., on the 6th June, 1892.

Swabey, for Pridham, asked to have an early day fixed, and consented on behalf of his client, the sitting member, that the trial should proceed, if necessary, during the session of Parliament, and undertook that his client should appear thereat.

Moscrip, for the petitioner Ellis, contended that under the statute the trial could not proceed during the session of Parliament.

Later in the day the judgment of the Court was delivered by

BOYD, C.—The proper inference from the opinion of the majority of the Judges in the *Glengarry Case*, 14 S. C. R. 453, is that the provision in s. 32 of the Controverted Elections Act, R. S. C. 9, as to the suspension of proceedings during the session of Parliament, is introduced for the benefit of the sitting member, the respondent. In the opinion of two of the learned Judges, FOURNIER and TASCHEREAU, JJ., the application to postpone on this account must originate with and be prosecuted by the sitting member: *vide* pp. 465 and 473.

Taking this as an interpretation of the law binding upon us, it follows that the day of trial should be fixed now, notwithstanding the desire of the petitioner to delay till the end of the present Parliamentary session. But the respondent does not make this claim. On the contrary, he is desirous of having the proceedings expedited, and undertakes also to appear at the trial, which, as far as we are concerned, removes any semblance of injustice and answers the desire of the petitioner to have the personal evidence of the sitting member taken before the Court.

The Court accordingly fixed an early day for trial.

[BOYD, C., 9TH APRIL, 1892.

CAMPBELL v. DUNN.

Life insurance—Benefit of children—Who to control proceeds—Executors or guardian—Will—R. S. O. c. 136.

A testatrix, having insured her life and made the policies payable to her two daughters, by her will required her executors, the defendants, to place the amount thereof in some thoroughly safe investment until the majority or marriage of her two daughters, when the amount and accumulated interest was to be divided equally; and she appointed her husband, the defendant, their guardian.

In an action brought by the guardian to have the proceeds of the policy handed over to him by the executors:—

Held, that the insurance moneys, being made payable to the daughters, were by 53 V. c. 39, s. 4, severed from her estate at her death, and her testamentary directions could not affect the fund beyond what is permitted by that statute and R. S. O. c. 136.

Held, also, that during the minority of the daughters, the trustees appointed by the will, as provided for by s. 11 of R. S. O. c. 136, might, by s. 13, invest in the manner authorized by the will; but, while the insured could give directions as to the investment, there was no control over the direction of the lawful

custodian of the fund in case the income should be needed for maintenance or education, or the *corpus* for advancement.

Held, also, that the guardian was the custodian of the daughters, with the incident of determining to a large extent what should be expended in their bringing up; and that the executors had charge of the preservation and utilization of the fund; and so the estate and the persons of the daughters were in different hands.

Held, also, that s. 12 of R. S. O. c. 136, does not justify an insurance company in paying the amount of a policy to a testamentary guardian; the guardian there named being one who has given security; and that the Court should not transfer the moneys from the executors to the guardian, as the latter's right to handle any part of the fund was subject to the trusts specified in the will, the execution of which was vested in the executors.

Moss, Q.C., for the plaintiff.

Thomas Wells, for the defendants.

[16TH APRIL, 1892.

HOLT v. TOWNSHIP OF MEDONTE.

Municipal corporations—By-law—Necessity for signature and seal—School sections—Divisions of—Injunction.

The powers of municipal corporations are to be exercised by by-law under the corporate seal and signed by the head and the clerk, unless otherwise authorized or provided for.

The division of school sections by municipalities involves the exercise of legislative powers, as to which the conclusion of the council should be embodied in a by-law.

A by-law purporting to divide a school section, signed by the clerk for the reeve, and without any corporate or other seal affixed:—

Held, invalid and ineffectual; and that it did not accomplish the object of the corporate action or bind the ratepayers of the school section as constituted before the attempted division; and an injunction was granted restraining the defendants from acting on such division.

Marsh, Q.C., and *Hewson*, for the plaintiffs.

Pepler, Q.C., and *J. A. McCarthy*, for the defendants.

[19TH APRIL, 1892.

KREH v. MOSES.

Life insurance—Effect of writing concerning policy—Gift—Declaration of trust—Will—Absence of witnesses.

One M. insured his life and signed a document directed to the managers of the company in these words: "I give and bequeath to * * the amount stated on the policy given on my life by the S. Life Insurance Company. To be paid to none other unless at my request, dated later." After showing or reading the policy, which he retained, he handed it to the plaintiff, remarking, "There, that is as good as a will."

In an action against the administrator, who had collected the money from the company after his death:—

Held, that, on account of its incompleteness, the transaction was not a gift; that as the trust intended was not irrevocable it was not a declaration of trust; and that it was of a testamentary character meant to be acted on only after the death of the donor; and that it could not take effect on account of the want of witnesses; and the action was dismissed.

Idington, Q.C., for the plaintiff.

Moscrip, for the defendant.

[27TH APRIL, 1892.

MUTTLEBURY v. TAYLOR.

Mortgage—More than one held by same person—Right of person liable to pay one, to demand assignment, without paying the others.

B., the owner of property, mortgaged it to the plaintiff, and then sold to H. subject to the mortgage, and took a second mortgage as part of his purchase money and assigned it to the plaintiff. H. then sold to W. W., to obtain an extension of time on the first mortgage, entered into a covenant with the plaintiff to pay it, and afterwards sold the property to C.

In a foreclosure action, in which the plaintiff asked for an order for the payment of the first mortgage by W. under his

covenant, W. asserting his willingness to pay the amount due on it, if the plaintiff would assign the mortgage to him :—

Held, that the plaintiff was not bound to assign to W. unless he paid off both.

F. E. Hodgins, for the plaintiff.

D. Urquhart, for the defendant Windeler.

[11TH MAY, 1892.

CITY OF TORONTO v. ONTARIO AND QUEBEC RAILWAY CO.

Railways and railway companies—Bonus—Condition—Maintenance of workshops—Amalgamation with larger company—Changing circumstances—Ceasing to maintain—Condition complied with.

A railway company, having obtained a bonus from the plaintiffs upon condition of locating and maintaining their machine shops within the city limits, did so erect and maintain them for some years until they amalgamated with and lost their identity in another company.

The amalgamated road was afterwards leased in perpetuity to a much larger and more extensive railway company, who removed the shops outside the city limits :—

Held, that, although all engagements and agreements made by the first-mentioned company were preserved by the legislation effecting the amalgamation and leasing, the acquisition in perpetuity by the larger company of the smaller, under the authority of Parliament, imposed new relations upon the amalgamated road which worked a change in the policy as to the site and size of the machine shops, and that the engagement was satisfied by their maintenance of the shops by the smaller company during its independent existence.

Robinson, Q.C., for the plaintiffs.

E. Blake, Q.C., and *A. M. Grier*, for the defendants.

[ROBERTSON, J., 28TH MAY, 1892.

COLVIN v. COLVIN.

Will—Devise without mentioning what—Intention—Unintentional omission—Words read into will.

A testator, being possessed of personalty and realty, bequeathed money legacies to a much greater amount than the personalty he owned, and then bequeathed to his "executors * * in trust to dispose thereof to best advantage in trust to be divided and paid over to my children in the sums mentioned and as soon as may be agreeable to the terms and conditions of certain mortgages and leases now standing against the property," without mentioning any property.

Held, that the Court, being satisfied that it was not the testator's intention to die intestate, in order to make sense of the will, would read into it the words "my property," presumably unintentionally omitted.

J. J. Stevens, for the plaintiff.

C. J. Holman, for the adult defendants.

F. W. Harcourt, for the infant defendants.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 27TH FEBRUARY, 1892.

ROCHE v. RYAN.

Plan—Registration—Effect of—Vesting of streets in municipality.

In 1886 the plaintiff, the owner of a tract of land within the limits of a town, subdivided it into a number of lots with streets intersecting them, and duly registered a plan thereof. In 1889 the town council had a plan prepared of all the land comprised in the town limits, and embodying the plaintiff's plan, which was duly registered by the corporation in June, 1890. About September following the plaintiff sold two of the lots to the defendant and two to one M., and shortly afterwards the defendant

took from the portion of the land laid down on the plan as a street and adjoining his lots a quantity of stone for building purposes. Subsequently in the same year the defendant applied to the council to open up the streets, when a resolution was passed referring the matter to the three street commissioners, and at an informal interview with two of the commissioners, the third not having been notified or consulted, verbal leave was given the defendant to take the stone, and afterwards in 1891 an agreement therefor, in consideration of the defendant opening up and grading the streets, was entered into with the corporation, the tract up to this time having been fenced in and used for pasturage.

In an action by the plaintiff to recover from the defendant the value of the stone removed by him :—

Held, reversing the judgment of STREET, J., that the action was not maintainable, for that under the Municipal and Surveyors Acts by the filing of the plan, and the sale of lots according to it, abutting on the street, the property in the street became vested in the municipality.

The common law doctrine as to the ownership of the soil of the highway *ad usque medium filum* was not under the circumstances applicable.

McCarthy, Q.C., for the plaintiff.

Watson, Q.C., for the defendant.

MASURET v. STEWART.

Fraudulent sale of goods—Intent to defeat creditors—Knowledge of insolvency—Direction to pay proceeds into Court.

Where a sale of a whole stock in trade was made by S. to L. and by L. to C. with knowledge of S.'s insolvency, and being in substance a sale by S. to C. with the object of defeating S.'s creditors, L. merely holding the moneys, the proceeds of the sale, for S., and thus for his creditors, the moneys were directed to be paid into Court for distribution amongst the creditors.

Gibbons, Q.C., for the plaintiff.

W. R. Meredith, Q.C., for the defendants.

[GALT, C.J., 25TH MARCH, 1892.

In re ADAMSON AND TOWNSHIP OF ETOBICOKE.

Municipal corporations—Bonus to street railway—Petition for, by assessed land-owners—By-law—Voting on—Majority.

Under s. 86 of the Municipal Amendment Act, 1891, 54 V. c. 42, the persons who may petition the council of a township to grant a bonus to a street railway within a defined portion of the township, are the assessed owners of the lands within such portion to the value of at least one-half thereof.

The by-law authorizing such bonus does not require the assent of a majority of the ratepayers entitled to vote thereon, but only a majority of those who actually vote.

H. S. Osler, for the applicant.

Fullerton, Q.C., and *Pinkerton*, for the township.

[MACMAHON, J., 7TH MARCH, 1892.

In re BRUNKER AND TOWNSHIP OF MARIPOSA.

Intoxicating liquors—Sale of, by retail—Local option by-law—Quantity—Locality—Days named for appointment of agents and declaring the result of polling—Sufficiency of—Notice—Sufficiency—Publication on Christmas and New Year's days.

A by-law passed by a township council under 53 V. c. 56, s. 18 (O.), was entitled a by-law to prohibit the retail sale of intoxicating liquors in the township of Mariposa, and enacted that "the sale by retail of spirituous liquors is and shall be prohibited in every tavern, inn, or other house or place of public entertainment: and the sale thereof is altogether prohibited in every shop or place other than a house of public entertainment."

Held, that the last part of the clause must be read in connection with the previous part so as to limit the prohibition to a sale by retail, which is now put beyond question by 54 V. c. 46, s. 1 (O.).

Slavin v. *Corporation of Orillia*, 36 U. C. R. 159, and *Re Local Option Act*, 18 A. R. 573, followed

Held, also, that the quantity of liquor to be deemed a sale by retail need not appear in the by-law, being defined by the statute; that the locality within which the liquor could be sold was sufficiently indicated; and that the want of a penalty in the by-law did not invalidate it.

The day named in the by-law for the appointment of agents to attend at the final summing up of the votes was nearly three weeks after the first publication of the by-law, and the day named for the clerk to declare the result of the polling was the second after the polling.

Held, both days sufficient.

The notice at the foot of the by-law, after certifying that the foregoing was a true copy of the proposed by-law of the township of Mariposa, which had been taken into consideration by the council thereof, and which would be finally passed, in the event of the electors' assent being obtained thereto, after one month's publication in a named paper, stated that all persons were required to take notice that on the 4th of January, 1892, a poll would be opened, naming the statutory hours at the several polling places named in the by-law, for the purpose of receiving the votes of the electors on the same. Two of the days of publication were Christmas and New Year's days.

Held, that the notice was sufficient; and the fact of publication on the days named did render the publication invalid; publication not being a judicial act.

Du Vernet and *J. E. Jones*, for the applicants.

J. J. Maclaren, Q.C., and *D. J. McIntyre*, Q.C., for the township.

IN CHAMBERS.

[ROSE, J., 31ST MAY, 1892.

OBERNIER v. ROBERTSON.

Pleading—Libel—Newspaper—Notice of action—Statement of claim.

In an action for libel contained in a public newspaper the statement of claim must be confined to the statements complained of and specified by the notice required by R. S. O. c. 57, s. 5, s-s. (2), to be given by the plaintiff before action; and where the plaintiff in such notice specified parts of an article published by the defendant, and in her statement of claim set out the whole article, the portions not specified in the notice were stricken out.

E. D. Armour, Q.C., for the plaintiff.

E. F. B. Johnston, Q.C. for the defendant.

[MACMAHON, J., 8TH JUNE, 1892.

LESLIE v. LESLIE.

Interim alimony—Disbursements—Counsel fee—Solicitor or his partner as counsel.

Upon the settlement of an order for interim alimony and disbursements, the plaintiff applied to Mr. WINCHESTER, Official Referee, sitting for the Master in Chambers, to have included in the allowance for interim disbursements in the action a sum of $60 to cover the fee to be paid to the counsel for the plaintiff with his brief for the trial. It appeared that the plaintiff's solicitor or his partner would probably act as counsel.

Mr. WINCHESTER stated that it had been his practice in such cases to disallow the charge, following *Lalonde* v. *Lalonde*, 11 P. R. 143; but enlarged the application to be heard by MACMAHON, J., in Chambers.

J. E. Jones, for the plaintiff, contended that the decision in *Lalonde* v. *Lalonde* proceeded, as stated by PROUDFOOT, J., in his judgment, on the special circumstances of that case.

J. G. Holmes, for the defendant, contra.

Knapp v. *Knapp*, 12 P. R. 105; *Bucke* v. *Bucke*, 21 Gr. 77; *Magurn* v. *Magurn*, 10 P. R. 570; *Bradley* v. *Bradley*, 10 P. R. 571, were referred to.

MACMAHON, J., held that in fixing the amount to be allowed the plaintiff to cover interim disbursements in an action for alimony, allowance is not to be made for a counsel fee to be paid at the trial where the plaintiff does not show that a counsel other than her solicitor or his partner is to be retained. The principle of *Lalonde* v. *Lalonde*, 11 P. R. 143, is not limited to the special circumstances of that case, but is of general application where the counsel to be retained is a member of the firm of solicitors acting for the plaintiff.

NOVA SCOTIA.

In the Supreme Court.

McDONALD v. ARBUCKLES.

Ejectment—Landlord and tenant—Notice to quit.

The defendant had no documentary title, but was in possession of the land claimed by the plaintiff in ejectment. The plaintiff recovered judgment against him, under which the land was sold and purchased by the plaintiff. The defendant afterwards took a lease of the land from the plaintiff, who at the expiration of the lease gave notice to quit and demanded possession.

Appeal from the judgment for the plaintiff dismissed.

In re HALIFAX SUGAR REFINERY CO.

Company—Winding-up—Foreign proceedings—Order here refused when proceedings pending in England.

The Halifax Sugar Refinery Company, Limited, was incorporated under the English Companies Act. Power was given by provincial legislation to organize a company here with the same name, but no steps were taken to organize under the provincial Acts, though the petitioner, G. G. Dustan, claimed that the company was so incorporated. Liquidation proceedings were taken in England, and a liquidator appointed there, with whom the present petitioner filed a claim as creditor, which was partly allowed and partly disallowed. It was after this claim had been so disallowed in part that the petitioner applied for a winding-up order under the Canadian Act.

Held, that even assuming that winding-up proceedings could be had here as auxiliary to those in England, there was no purpose to be served by such proceedings which could not be as well served by the English proceedings; and that the application should be refused.

MANITOBA.

In the Queen's Bench.

[THE FULL COURT, 3RD MAY, 1892.

GIBBONS v. CHADWICK.

Prohibition—County Court—Appeal to full Court—Service of notice of appeal on County Judge.

Appeal from the decision of BAIN, J., *ante* p. 207.

When the appeal was called on, counsel for the plaintiff took the objection that notice of it had not been served upon the the Judge of the County Court of Selkirk, producing an affidavit in support of his objection.

Held, that it was necessary to serve the Judge with the rule *nisi* for a writ of prohibition, as the rule called on both the Judge and the plaintiff to show cause why the writ should not issue. It was equally necessary to serve him with notice of an appeal from a judgment refusing to make the rule *nisi* absolute, and discharging it. Should the appeal be allowed and the writ of prohibition ordered to issue, it would be addressed to the Judge. That he did not appear upon the argument of the rule *nisi* could make no difference.

The appeal could not proceed without notice to the Judge, and must be dismissed with costs. Considering the trifling amount at stake it did not seem a case for allowing the appeal to stand over, with leave still to serve the learned Judge.

Elliott, for the plaintiff.

Cameron, for the defendant.

[4TH JUNE, 1892.

CROTTY v. TAYLOR.

Mortgage—Sale by mortgagees under power of sale—Bill to restrain proceedings under covenant—Demurrer—Inability of mortgagees to re-convey.

Appeal from the decision of BAIN, J., *ante* p. 188.

Held, that a mortgagee who has exercised a power of sale contained in his mortgage deed, and who has thereby realized only part of the amount due, can proceed to enforce payment of any deficiency. He can so proceed against a surety as well as the original debtor, because he has only exercised a right which he expressly stipulated for, which is conferred upon him by the mortgage, and subject to his right to exercise which the surety took upon himself the obligation of suretyship.

But that the power of sale has not been exercised *bona fide*, that it has been used for an improper purpose, seems to be, and and certainly ought to be, a defence to an action upon the covenant brought upon such improper exercise of the power.

On the facts of this particular case, as alleged in the bill, the defendants having put it out of their power to re-convey to the plaintiffs upon payment of the mortgage, and having done this by an exercise of a power of sale which was not *bona fide*, but intended to cut out the equity of redemption while still enforcing payment of the debt, the plaintiffs were entitled to the relief prayed, and the order overruling the demurrer should be affirmed with costs.

VELIE v. RUTHERFORD.

Married woman—Liability on contract—Separate estate.

The plaintiff sued in a County Court on a promissory note, signed not by the defendant herself, but by her husband, Peter Rutherford, professing to act under a power of attorney from her.

The County Court Judge found that the defendant was a married woman; that the power of attorney was limited to the transaction of business on her behalf with a particular bank; and that the plaintiff had not shown that she had, or had at the time the obligation was entered into, any separate property. He held it necessary that this should be proved, and he gave judgment in favour of the defendant.

The plaintiff appealed to a Judge of the Court of Queen's Bench, and the appeal was dismissed.

The plaintiff then appealed to the full Court.

Held, that debts contracted by a married woman in carrying on a business or employment, occupation or trade, in her own behalf, separately from her husband, may be sued for as if she were an unmarried woman, that is, without regard to separate estate.

When suing a married woman it is necessary to prove one of two things. It must be proved that she is carrying on a business or employment, occupation or trade, separate from her husband, and that the liability sued upon arose out of, or was contracted in connection with, that separate business or employment, occupation or trade. Or it must be shown that the married woman is possessed of separate property upon which it may be presumed she intended the liability incurred or contract entered into, and which is the subject-matter of the suit, should attach, or out of which it should be paid. The plaintiff proved neither of these; there was no evidence of the existence of separate property, nor was there any proof that the defendant was carrying on a business or employment, occupation or trade, separately from her husband. There cannot be a verdict for the plaintiff. The proper order to be made is that the verdict for the defendant be set aside and a non-suit entered, but the plaintiff must bear the costs of the present appeal.

Elliott, for the plaintiff.

Kennedy, Q.C., for the defendant.

BERTRAND v. PARKES.

Chattel mortgages—Second given in substitution for first—Preferences.

The plaintiff filed his bill as assignee for the creditors of one Whitehead, the assignment having been made to him as official assignee under 49 V. c. 45 (M). He alleged that he was in possession of certain goods, the stock-in-trade of Whitehead, but that the defendant claimed them under a chattel mortgage made by Whitehead to him; that he threatened to take the goods under the mortgage, and would do so unless restrained by the order of the Court. The allegation was also made that the mortgage was fraudulent and void as against creditors and should be set aside. The chattel mortgage referred to in the bill, as originally filed, was one dated 30th January, 1889, and the prayer was that it might be declared fraudulent and void as against the plaintiff, and that the defendant might be restrained from taking possession of the goods and from interfering with the stock-in-trade.

The defendant, by his answer, besides asserting the validity of the mortgage attacked, set up a prior mortgage dated 31st January, 1887, alleging that the second one was merely made in pursuance of an agreement for extending the time for payment of the mortgage money.

The plaintiff amended his bill, setting up that the earlier mortgage had never been filed, that the later one was taken in satisfaction and in lieu of the earlier one, and that by the giving and accepting of the later one, the earlier one was discharged and at an end.

A decree was made declaring the two mortgages void as against the plaintiff as official assignee, and that he held the estate of Whitehead free from the chattel mortgages.

The defendant set the case down for re-hearing before the full Court.

The trial Judge found that when the first mortgage was given Whitehead was insolvent. As the defendant was leaving Winnipeg, he wrote to Whitehead that he wished a mortgage for the money he had advanced, and subsequently he pressed for the security.

Held, that the mortgage having been given under such circumstances, it would seem from the recent cases of *Molsons Bank* v. *Halter*, 18 S. C. R. 88, and *Stephens* v. *McArthur*, 19 S. C. R. 446, that the mortgage could not be held void as a preference, even if the mortgagor was insolvent when it was given. To render a transaction void as a preference it must be the result of the pure voluntary act of the debtor.

The two mortgages were identical except in their dates and the times when the money was to be paid. The first mortgage was a good consideration for the second.

The first was given in pursuance of a demand from the mortgagee that he must have the money or security, and that demand must be taken as continuing to be made until payment. The mere substitution of another mortgage for the one given at the time of that demand cannot affect the question. The second mortgage given in substitution of the first must be as good as the first.

The decree made at the hearing was reversed, and the bill dismissed with costs, including costs of the re-hearing.

Howell, Q.C., and *Crawford*, for the plaintiff.

Ewart, Q.C., for the defendant.

WOODS v. MATHESON.

Contract—Agreement, an entire one—Non-performance by plaintiff of the whole agreement, on his part—Liability of defendant conditional on plaintiff's performance of whole agreement.

The plaintiff on 11th October, 1890, agreed with the defendant, the president of the Lake Winnipeg Transportation Lumber and Trading Company, to provide within a limited time $5,000, which he was to use in the purchase of supplies for the purpose of getting out logs and was to arrange for any further funds necessary to carry on the business of the company. He was to pay all debts owing by the company, except certain debts which were specified in the agreement, to insure the property of the company, to procure an extension of time from a mortgagee on part of the company's property, to give the defendant a mortgage for $7,000, and jointly with another person a promissory

note for $5,000. The defendant on the other hand undertook to have all the stock in the company transferred to the plaintiff not later than 1st December, 1890, and in case of his failure to do so, to pay back any moneys advanced by the plaintiff for paying off debts of the company and for the purpose of carrying on the company's business.

The stock not having been transferred, the plaintiff sued to recover back moneys advanced by him. But he did not provide the $5,000 to be used in purchasing supplies for the company; for although he did deposit in a bank about that amount and for that purpose, he afterwards appropriated a large part of it to his own purposes. He did not arrange for the further funds necessary to carry on the business of the company, nor did he pay the debts. He paid part of the debts, but he did so by using part of the money advanced for the purchase of supplies in making payments on account of some of the debts, so that the creditors might thereby be induced to furnish further supplies upon credit.

At the trial before BAIN, J., a verdict was entered for the defendant. The plaintiff appealed.

Held, that the agreement on the plaintiff's part was an entire one, and he had not performed those parts of it which were to be performed by him before the transfer of the stock. The liability of the defendant to procure a transfer of the stock on 1st December, and to repay advances in default of his procuring such transfer, was conditional upon the plaintiff having duly performed those parts of the agreement to be performed by him before that date.

The appeal was dismissed with costs.

Ewart, Q.C., for the plaintiff.

Howell, Q.C., and *Mathers*, for the defendant.

TAYLOR v. SHARP.

Mortgage suit—Decree for sale—Sale—Execution issued for balance—Petition to set aside sale as invalid—Fraud upon the Court.

Appeal from the decision of TAYLOR, C.J., *ante* p. 79.

Held, that the order of the Chief Justice should be affirmed with costs.

It was not necessary to have any order setting aside the sale, or the report confirming it, in order to entitle the petitioners to have the subsequent proceedings set aside. The report confirming the sale and the vesting order were obtained by the practice of a fraud upon the Court and the defendants. It is competent for every Court to treat as a nullity any judgment which can be shown to have been obtained by manifest fraud.

REGINA v. LACOURSIERE.

Criminal law—Certiorari—Return made by two justices out of three—Abuse of criminal process—Costs against private prosecutor.

Ovide Lacoursiere was convicted of receiving stolen goods, by three justices of the peace. He obtained a writ of *certiorari* to bring up the proceedings for the purpose of moving to quash the conviction. From the order granting this writ an appeal was taken. But a return to the *certiorari* having been made, Lacoursiere obtained a rule *nisi* calling upon the prosecutor and the justices to show cause why the conviction should not be quashed. This was referred to the full Court to come on for argument with the appeal. Preliminary objections were taken to the appeal, and the same was dismissed. The rule to show cause why the conviction should not be quashed was then proceeded with. Counsel appeared on this for the prosecutor and two of the justices, Hepworth and Dixon. He took the objection that no proper return had been made to the writ of *certiorari*—none upon which the Court could act. The conviction was by three justices, Hepworth, Dixon, and Mulvihill. The return to the *certiorari* and the schedule attached to the writ were signed by Hepworth and Dixon only. Mulvihill, who seemed to have been temporarily absent from the Province, afterwards made a return on a separate paper, which was not attached to the writ. The contention was that the document signed by him, not being attached to the writ, and being, perhaps, in some other respects, defective, could not be looked at, and there being thus a return from only two of the three justices, there was, in fact, no return which would entitle the Court to deal with the case.

Held, that a return to a writ of *certiorari*, made by one or two of several convicting justices, provided they, having the record in their custody, can return it, is a sufficient return, and one upon which the Court can act.

The question really seemed to be whether the proceedings were before the Court in such a way as to establish their authenticity.

The rule to quash the conviction must be made absolute, with costs against the private prosecutor.

There was no evidence of any felonious intent on the part of Lacoursiere in anything he did. On the contrary, the evidence proved that there was no such intent.

The whole proceedings, arrest, trial, and conviction, were a gross abuse of criminal process for the purpose of obtaining an undue advantage in a most trivial matter. Against the private prosecutor there could be no hesitation in ordering the payment of costs.

Mulock, Q.C., for the justices and private prosecutor.

Haggard, for Lacoursiere.

MERCHANTS BANK v. CARLEY.

Judgment debtor—Examination of—Refusal to answer questions concerning business carried on in wife's name—Separate property of wife.

In 1888 the plaintiffs recovered a judgment against the defendant. The same year the defendant made an assignment for the benefit of his creditors, and soon after left the Province, returning again in 1889. Recently the plaintiffs proceeded to have him examined under the Administration of Justice Act, now R. S. M. c. 1, s. 64, and upon that examination he, on advice of his attorney, declined to answer certain questions put to him. Thereupon a motion was made for his committal, which was refused, and the plaintiffs appealed to the full Court.

From the examination of the defendant, so far as it had proceeded, it appeared that since his return to the Province, a business had been and was then carried on under the name of Carley Brothers. The defendant's wife and his brother were partners;

the capital was contributed by them in equal shares, and they, and they alone, were interested in it; not one cent of the defendant's personal money went into the business; his wife took no part in the management of the business except through him. It was managed by his brother and himself; he represented his wife's share, acting under a power of attorney from her, and he received a salary of $20 a week. Profits had been made in the business. The defendant was asked, how much money did his wife put into the business; what had the profits of the business been since its commencement; what was the approximate value of the stock; what were the approximate liabilities of the firm; what was the approximate value of his wife's share of the business; and had any money been drawn out of the business by his wife apart from the amount that had been paid to him as salary. Each of which questions the defendant, on the advice of counsel, refused to answer.

Held, that the business was not one carried on by the wife separately from the husband; she did not carry it on at all; he represented the wife's share in the business; except through him she took no part in the business. The business had been carried on at a profit, and a sufficient case had been made to show that the husband was entitled to an interest in that profit. He was therefore bound to answer such questions as might be put to him respecting the profits derived from the business, and how they had been disposed of and dealt with. That others were interested was not a reason for refusing to make such discovery. His refusal to answer the questions put to him was not contumacious.

The appeal should be allowed and an order made that the defendant attend at his own expense and submit to be examined as to the profits of the business and as to how they had been dealt with and disposed of.

The plaintiffs were entitled to the costs of the application in Chambers, the costs of the appeal, and any additional costs they might have been put to by the defendant's refusal to answer.

Tupper, Q.C., and *Phippen*, for the plaintiffs.

Elliott, for the defendant.

[TAYLOR, C.J., 10TH MAY, 1892.

HARDY v. DESJARLAIS.

Real Property Act—Order for production—Application to bar defendant, for non-compliance with—Affidavit made by defendant's attorney insufficient.

This was a matter under the Real Property Act, in which an issue had been directed to be tried.

The plaintiff obtained on 24th March an order for production by the defendant on the tenth day after service of the order upon him or his attorney. A summons was obtained by the plaintiff calling upon the defendant to show cause why an order should not be made barring him in the matter of the issue, on the ground that he had made default in not producing under the order of 24th March, or why he should not be committed for contempt of Court in disobeying the order.

The defendant set up that he had sufficiently complied with the order to produce; he lived in the country where there was postal communication only once a week, and to a letter sent one week no reply could be received until the next week thereafter. On the tenth day after service on the defendant's attorney, he filed an affidavit on production made by himself, and he informed the plaintiff's attorney that he had all the documents and would show them to him at any time.

Held, that the summons could not be supported, but as the defendant was in default the summons would be discharged without costs.

There had been no personal service of the order, so there could be no committal for not obeying it.

The plaintiff could not have, on the present application, the relief he sought that the defendant be barred in the matter of the issue. The present application was made in the matter of the issue, but an order rescinding the order for an issue, or barring a party to it, must be made in the original cause or matter.

The defendant was clearly in default. A party is not bound to take the affidavit of the attorney on the opposite side as a sufficient affidavit of documents; he is entitled to the oath of his opponent that the documents produced are all he has, or account-

ing for any not produced. The plaintiff's attorney was not bound to examine the documents until an affidavit was filed.

Mulock, Q.C., for the plaintiff.

C. P. Wilson, for the defendant.

[DUBUC, J., 20TH JUNE, 1892.

HARDY v. DESJARLAIS.

Real Property Act—Sale of half-breed lands—Order of Court—Secondary evidence of—Substantial compliance with order of Court.

Issue under the Real Property Act. The lands in question were allotted to the defendant, Napoleon Desjarlais, as his share of the land granted to the children of half-breed heads of families residing in Manitoba at the time of the transfer.

The plaintiff claimed that in 1880, under the provisions of an Act respecting infants and their estates, 41 V. c. 7, s. 15, an order of the Court was obtained on the petition of the defendant, then an infant, presented by his father, André Desjarlais, for a sale of the lands, the proceeds to be applied to the maintenance and education of the defendant, the order directing and authorizing the father to execute a conveyance of the lands on conditions therein stated; that under the order the lands were conveyed to the Rev. C. St. Pierre; and that by subsequent conveyances they became vested in the plaintiff.

The defendant when he became of age made an application for a certificate of title under the Real Property Act, claiming the lands under his patent from the Crown dated 2nd October, 1882. The plaintiff filed a caveat, and an issue was directed to determine the ownership of the land.

To the title set up by the plaintiff, the defendant urged two objections:—1. That the order of the Court authorizing the sale of the lands was not proven to have been made; 2. That, assuming the order to have been made, the conditions on which the lands were, in the order, directed to be conveyed were not performed: and he contended that the sale and conveyance were therefore void.

The original order was not produced, but a copy, certified by the registrar to be a true copy. The order directed that the sum of $200 should be accepted for the land; that a sale be made to St. Pierre upon payment into Court of that sum; that, upon such payment into Court for the use, maintenance, and education of the infant, the father be empowered to execute a conveyance of the lands; that the $200 be then paid out to St. Pierre on his executing a bond to the Master of the Court conditioned for the proper expending of the money so entrusted to him. What purported to be a copy of the order was found in a book kept for registering such orders in the office of the registrar of the Court. An office copy was also produced under the seal of the Court with stamps thereon appearing to have been cancelled on 5th August, 1882.

Held, that the evidence of loss was sufficient to warrant the admission of the secondary evidence and that such secondary evidence was, as such, as complete as it could be under the circumstances. The order must be held to have been made by the Court.

The evidence showed that St. Pierre paid from time to time different sums of money to the father of the infant and that he paid for some provisions and articles required by the father for the maintenance and support of his family. In June, 1881, a considerable portion, if not the whole, of the purchase money had been paid. The formality of paying the money into Court and out again was gone through on 23rd September, 1881.

Held, that the terms of the order having been substantially complied with, the provisions of ss. 1 and 2 of 48 V. c. 30, reproduced in R. S. M. c. 67, ss. 11 and 22, should be considered as fully applying.

Verdict entered for the plaintiff.

Howell, Q.C., and *Mulock*, Q.C., for the plaintiff.

Ewart, Q.C., and *Chaffey*, for the defendant.

[KILLAM, J., 3RD JUNE, 1892.

REGINA v. DAVIDSON.

Criminal law—Conviction for gaming—Release of prisoner—Insufficient evidence of "support" by gaming.

This was an application for a writ of *habeas corpus* to bring up a prisoner in custody under conviction and sentence of imprisonment upon a charge of having been, on 11th May, 1892, a person having no peaceable profession or calling to maintain himself by, but who, for the most part, supported himself by gaming, and of then being a loose, idle, and disorderly person, and a vagrant.

The most important objection taken was that there was not before the magistrate evidence to warrant the conviction.

The charge was laid under R. S. C. c. 157, s. 8, s-s. (k), which provides that all persons who have no peaceable profession or calling to maintain themselves by, but who do, for the most part, support themselves by gaming or crime, or by the avails of prostitution, are loose, idle, or disorderly persons, or vagrants. It was to "gaming" only that there was any pretence that the evidence pointed.

Held, that to support the conviction, it was necessary there should be evidence of four distinct propositions :—

1. That the accused had no peaceable profession or calling to support himself by.

2. That he practised gaming.

3. That from this practice he derived some substantial profits.

4. That these profits constituted the larger portion of his means of support.

There was abundant evidence of the first and second propositions, but there was no reasonable evidence to warrant a finding of either the third or fourth proposition.

The accused might have neither profession nor calling by which to maintain himself. He might be possessed of sufficient means to enable him to live in idleness or he might be supported by others. He might gamble extensively, and, yet, not derive from the practice any means of support. A few instances of winnings by the accused were mentioned in the evidence, but whether on the whole he won or lost there was nothing to show.

The conviction was not supported by evidence of all the facts necessary to support it, and the prisoner must be discharged.

Hough, for the prosecution.

Howell, Q.C., for the prisoner.

[BAIN, J., 25TH MAY, 1892.

ROFF v. KROCKER.

Replevin—Chattel mortgage—Notice of prior mortgage—Registration where goods "situated"—Mortgagee bound by notice to agent.

Action of replevin. In the autumn of 1891 the plaintiff recovered a judgment against one Harder, in the County Court of the Division of Manchester, and he directed the bailiff to try to make the money on the judgment and to use his own discretion as to the means he should employ in making it. All Harder's goods were covered by chattel mortgages except a pair of horses, which were exempt from seizure. The bailiff induced Harder to execute a chattel mortgage on these horses to the plaintiff for the amount of the debt and costs. This mortgage was executed 17th October, 1891, and at this time Harder was living and farming in the County Court Division of Manchester; the horses were at his place when the mortgage was executed, and on 20th October the mortgage was filed by the plaintiff in the County Court office for the Manchester Division. No other mortgage was registered in this Division against these horses, but at the time Walton, the bailiff, took this mortgage for the plaintiff, he (Walton) knew that the horses were already included in a mortgage that Harder had previously executed to the defendants, and that the defendants' mortgage was registered in the adjoining County Court Division of Dufferin. Walton did not appear to have told the plaintiff that there was

this prior mortgage, but the defendant Krocker stated that he himself told the plaintiff in September, 1891, that the defendants had a mortgage on Harder's team. The plaintiff, however, stated that it was not till after he had taken his mortgage that Krocker told him of the prior one to the defendants. Harder's mortgage to the defendants was dated 9th December, 1890, and was filed on 13th April, 1891. This mortgage was executed by Harder at the defendants' place, where he had driven with the horses in question with a load of wheat, and at the time the mortgage was executed the horses were in the Division of Dufferin.

Default having been made by Harder, the defendants took possession of the team and kept them until they were replevied.

The direction of the statute was that the mortgage "shall be filed with the clerk of the County Court of the Judicial Division where the said goods and chattels are situated."

Held, that the Division in which the horses were "situated" was that of their owner's residence and domicil at which they were themselves usually kept. For some time before, and at the time the mortgage to the defendants was executed, Harder's home and domicil were in the Division of Manchester, and it was there he kept his horses, using them on and in connection with his farm. At the moment he executed the mortgage the horses happened to be in the Division of Dufferin by accident and for a merely temporary purpose. The defendants' mortgage then was not filed as directed by the Chattel Mortgage Act.

But it was certain that Walton, who took the mortage for the plaintiff, and whose action in taking it the plaintiff fully adopted, had notice when he took the mortgage that the defendants had a prior mortgage on the horses, and, whether the plaintiff himself had notice or not, he must be bound by the notice that Walton had. Walton would not have been a purchaser in good faith had he taken the mortgage on the horses for himself, and the plaintiff could not be in any better position than that in which Walton would have been.

Verdict entered for the defendants.

Tupper, Q.C., and *Phippen*, for the plaintiff.

Munson, for the defendants.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [21st June, 1892.

MARSH v. WEBB.

Title—Adverse possession—Husband and wife—32 H. VIII. c. 9.

This was an appeal by the defendants from the judgment of the Queen's Bench Division, 21 O. R. 281, reversing the judgment of Rose, J., at the trial in their favour, and was argued on the 28th March, 1892.

W. R. Riddell and *F. L. Webb*, for the appellants.

J. R. Roaf, for the respondents.

The Court, Burton, J.A., dissenting, dismissed the appeal with costs, agreeing with the Court below that on the evidence the possession of George S. Marsh was not adverse, and agreeing in their view of the result of such finding.

Burton, J.A., disssented on the ground that the finding of the trial Judge as to the nature of the possession should be accepted as conclusive.

DAVIES v. GILLARD.

Assignments and preferences—Pressure—Collusion—R. S. O. c. 124, s. 2.

This was an appeal by the defendants from the judgment of the Queen's Bench Division, 21 O. R. 431, reversing the judgment of Armour, C.J., at the trial in their favour, and was argued on the 31st May, 1892.

The action was brought to set aside as a fraudulent preference a chattel mortgage made by the defendant McKellar to his co-defendants Gillard & Company on the 11th of March, 1891, before the passing of the amending Act 54 V. c. 20.

Moss, Q.C., for the appellants.

W. Cassels, Q.C., and *S. King*, for the respondents.

The appeal was allowed with costs, the Court holding that on the finding of the learned Chief Justice as to pressure, the transaction ought not to have been set aside.

GORDON v. RUMBLE.

False arrest—Malicious prosecution—Sheriff—Bailiff.

The plaintiff, acting as bailiff under a landlord's distress warrant, attempted to remove some grain which was at the time under seizure by the defendant as sheriff's officer, and was arrested by the defendant.

Held, reversing the judgment of the Queen's Bench Division, that the sheriff was liable for the act of his officer.

Beatty v. *Rumble*, 21 O. R. 184, considered.

John MacGregor, for the appellant.

C. C. Robinson and *G. F. Cane*, for the respondents.

DALRYMPLE v. SCOTT.

Contract—Letters—Breach—Condition—Damages—Sale of goods.

To a written offer to sell some flour on certain terms the following telegram was sent:—"Letter received, offer accepted, writing." No letter was written.

Held, affirming the judgment of the Queen's Bench Division, that there was a completed contract.

Where, before the time for the completion of a contract for sale of goods, one party notifies the other that he does not intend to complete, that notification may be treated as a breach and at once acted on; but if, as he may, the other party waits till the time for completion and then brings his action, he must show that at this time he had himself fulfilled all conditions precedent on his part.

Judgment of the Queen's Bench Division on this branch of the case reversed; MACLENNAN, J.A., dissenting.

Watson, Q.C., for the appellants.

S. G. McKay, for the respondents.

[28TH JUNE, 1892.

CUMMING v. LANDED BANKING & LOAN COMPANY.

Trusts and trustees—Executors—Breach of trust.

One executor may without the concurrence of his co-executor validly sell or pledge assets of the estate to a purchaser or mortgagee in good faith, and the purchaser or mortgagee is not put upon inquiry or affected with notice of breach of trust because the executor is described in the transfer or mortgage as "trustee." Every executor is a trustee, but he does not cease to be an executor and become merely a trustee until the testator's wishes are completely carried out.

Judgment of the Queen's Bench Division, 20 O. R. 382, affirming that of BOYD, C., 19 O. R. 426, reversed; HAGARTY, C.J.O., dissenting.

Mackelcan, Q.C., and *W. Cassels*, Q.C., for the appellants.

Marsh, Q.C., for the respondents.

C. P. D.] [21ST JUNE, 1892.

REGINA v. ELBORNE.

Intoxicating liquors—Sale by druggist—R. S. O. c. 194, ss. 49, 50, 52, 85.

These were appeals by the Crown from three orders of the Common Pleas Division quashing three convictions of the defendant, a druggist, "for that he unlawfully did sell liquor without recording the same as required by the 'Liquor License Act.'" The decision of the Common Pleas Division in one case is reported 21 O. R. 504.

The appeals were argued on the 27th and 30th May, 1892.

Langton, Q.C., for the appellant.

G. W. Meyer, for the respondent.

The Court allowed the appeals without costs, holding that the convictions might properly be upheld under s. 85 for the offence of not recording sales in a book, though not for unlawfully selling.

See now 55 V. c. 51, s. 7.

BOYD, C.]

In re ALGER AND THE SARNIA OIL COMPANY.

Company—Winding-up—Sale by tender—Extending time.

This was an appeal by J. L. Englehart from the judgment of BOYD, C., reported 21 O. R. 440, and was argued on the 3rd June, 1892.

W. R. Meredith, Q.C., and *F. A. Hilton*, for the appellant.

E. R. Cameron, for the respondent Alger.

D. MacMillan, Q.C., for the liquidator.

The appeal was dismissed with costs, the Court agreeing with the reasons for judgment in the Court below.

FALCONBRIDGE, J.]

In re PRITTIE AND CITY OF TORONTO.

Municipal corporations—Sewer—Easement—Arbitration—Practice—52 V. c. 13.

A municipal corporation has power to expropriate lands for the purpose of constructing a sewer, and also has power to expropriate, as incident thereto, the right of entry thereto for the purpose of maintenance and repair.

The date of the passing of the by-law defining the lands and the nature of the rights required is the date in relation to which the compensation should be assessed.

The effect of 52 V. c. 13, as to the practice in moving to set aside awards, considered.

Judgment of FALCONBRIDGE, J., reversed; OSLER, J.A., dissenting.

Biggar, Q.C., and *H. M. Mowat*, for the appellants.

Ritchie, Q.C., and *J. Pearson*, for the respondents.

C. C. York.]

RYAN v. McCARTNEY.

Division Court—County Court—Transcript—Judgment summons.

A transcript may be validly issued from a Division Court to a County Court, notwithstanding the pendency in the Division Court of proceedings by way of judgment summons, but as soon as the transcript is issued and filed the judgment becomes a judgment of the County Court and the judgment summons cannot be continued.

The form of a transcript considered.

Judgment of the County Court of York reversed.

T. Hislop, for the appellant.

J. M. Glenn, for the respondent.

C. C. Middlesex.]

WEIR v. SMYTH.

Justice of the peace—Qualification—R. S. O. c. 71, s. 9.

The property qualification of a justice of the peace required by R. S. O. c. 71, s. 9, need not be in itself of the value of $1,200. It is sufficient if he has, in lands which are of the value of $1,200 over and above what will satisfy and discharge all incumbrances affecting the same, and over and above all rents and charges payable out of or affecting the same, such an estate or interest as is mentioned in the section, whatever the value of the estate or interest may be.

Judgment of the County Court of Middlesex affirmed.

Aylesworth, Q.C., for the appellant.

J. B. McKillop, for the respondent.

C. C. ELGIN.]

ROACH v. McLACHLAN.

Execution—Wages—Chattel mortgage—Creditors' Relief Act, R. S. O. c. 65—Wages Act, R. S. O. c. 127.

Certain goods, upon which the execution debtor had given a chattel mortgage, were sold under an execution, the proceeds not being more than the amount of that execution over which the chattel mortgagee did not claim priority. Notice of the levy was given by the sheriff, and within the time limited servants of the execution debtor, who had obtained judgments for their claims, placed executions in the shoriff's hands.

Held, reversing the judgment of the County Court of Elgin, by which the sheriff's scheme of distribution was affirmed, that the wage-earners were not entitled to the proceeds of the sale in priority to the first execution creditor or even to share in such proceeds.

Aylesworth, Q.C., and *J. A. McLean*, for the appellants.

J. M. Glenn, for the respondents.

High Court of Justice.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 28TH JUNE, 1892.

MILLER v. RYERSON.

Medical practitioners—College of Physicians and Surgeons—Limitation of actions—R. S. O. c. 148, s. 40—Infancy.

In an action brought by an infant by her next friend against a physician, a member of the College of Physicians and Surgeons, for malpractice, more than a year after the services of the physician terminated, but, as was alleged, within a year from the time the injury became apparent:—

Held, that under R. S. O. c. 148, s. 40, it was not commenced in time, and must be dismissed.

Per BOYD, C.—No exception in favour of infants is to be implied in derogation of the general words of the Act. The liability arises when the professional services are rendered.

J. G. Holmes, for the plaintiff.

Bigelow, Q.C., and *Aylesworth*, Q.C., for the defendant.

HETT v. IANSEN.

Landlord and tenant—Covenant to repair—Defective grating—Who liable—Owner or tenant.

In an action against the owner of a building for damages caused by a defective grating in front of it, in which it was shown that the premises were leased to tenants who had covenanted to repair, and after the expiry of the lease had remained on as tenants :—

Held, affirming the judgment of ARMOUR, C.J., that the owner of the premises was not liable.

King, Q.C., for the plaintiff.

Laidlaw, Q.C., and *Millar*, Q.C., for the defendant.

GUNN v. CALDWELL.

Promissory notes—Collateral security—Discount and subsequent retirement of—Action on—Effect of.

On a sale of land an extension of time for some payments was granted, when some promissory notes made by subsequent purchasers were given to the plaintiff as collateral security. The plaintiff discounted the notes, but was obliged to retire them at maturity, and afterwards recovered judgment on them without being able to realize anything.

Held, reversing the judgment of GALT, C.J., that this treatment of the notes did not make them the plaintiff's property, and that in an action to recover the balance of the purchase money he was not bound to give credit for their amount.

Robert Hodge, for the plaintiff.

A. Elliott, for the defendant.

[BOYD, C., 15TH JUNE, 1892.

JENNINGS v. WILLES.

Mechanics' Lien Act—"Payments"—R. S. O. c. 126, s. 9.

The word "payments" in s. 9 of the Mechanics' Lien Act, R. S. O. c. 126, is intended to cover payments made by the owner at the instance or by the direction of the contractor to those who supply material to him, as in this case.

So in like manner "payment" may well extend to the case of payment by the giving of a bill or a promissory note, as was done at the instance of the contractor to the other material men in this case.

D. M. Robertson, for the plaintiff.

R. McKay, for the defendant Wylie.

F. E. Hodgins, for the defendants Harris & Co.

Kilmer, for the defendants the Christie Lime & Stone Co.

[FERGUSON, J., 16TH JUNE, 1892.

JUDGE v. SPLANN.

Will—Devise—Right to remain and live on "place," while unmarried—Interest in—Use of.

A testator by his will devised as follows:—

"I will, devise, and bequeath to my wife S. J. all my real and personal property during her natural life and that my daughter S. J. shall remain and live on said place as long as she remains unmarried." The only real estate or "place" the testator owned was his farm, on which his widow remained with the daughter until the death of the former.

Held, that the daughter had the right after her mother's death to live on the property as long as she remained unmarried, and that she had an estate in and was entitled to the use of it, as she might choose to use it, for that period.

Standish, for the plaintiffs.

A. Cassels, for testator's family.

Justin, for the purchasers.

NOVA SCOTIA.

In the Supreme Court.

PUTNAM v. HARDMAN.

Verdict of jury—Motion to set aside for misdirection dismissed—Latitude allowed to Judge in commenting on evidence.

The plaintiff and the defendants T. and H. entered into an agreement in writing for the purpose of working certain gold areas, the plaintiff and the defendant T. agreeing to furnish capital, and the defendant H. to give his time to the management of the property. Each partner was to be entitled to one-third of the profits.

In an action brought by the plaintiff against his co-partners claiming an account, the appointment of a receiver, the winding-up of the business, etc., the evidence was of a contradictory character.

The presiding Judge charged strongly in favour of the plaintiff. A number of questions were submitted to the jury by the Judge, and a number also at the instance of the defendants' counsel, and the answers being favourable to the plaintiff, the verdict was entered accordingly. The defendants sought to have the findings set aside as against the law and evidence, and for misdirection.

The language of the charge indicated that the evidence had made a strong impression on the mind of the Judge, favourable to the plaintiff, and made this very apparent to the jury, but he did not withdraw any fact from the consideration of the jury, but left the evidence to them with the distinct direction that it was their province to find on the questions submitted to them, irrespective of any opinion expressed by him.

Held, in view of the wide latitude permitted by the practice of the Court to a Judge in his direction to a jury on the facts, that the Court would not undertake to say that the observations of the Judge unduly biassed the minds of the jury or that their findings would have been different had the facts been submitted without comment.

The questions submitted by the defendants' counsel having distinctly and clearly brought before the minds of the jury the real and substantial questions at issue between the parties, the Court refused to disturb the verdict on the ground that facts and circumstances, incidentally disclosed by the evidence during the trial, but which were not set out in the pleadings, imputing fraud or misconduct to the defendants, were submitted to the jury by the Judge.

REGINA v. SIMON FRASER.

Certiorari—Rescinding order for—Quashing certiorari—Effect of Crown Rules.

Since the passing of the Crown Rules, 1889, the Court will not entertain a motion to rescind an order for *certiorari* except by way of appeal, when an appeal is provided by the practice of the Court, nor to quash a writ of *certiorari* unless for cause which has arisen since the order was granted.

REGINA v. McDOUGALL.

Constitutional law—Nova Scotia Liquor License Act of 1886—Validity of wholesale and brewers' license clauses.

The defendant was convicted under the Nova Scotia Liquor License Act of 1886 of five offences: 1, for selling without license from a warehouse a cask of wine containing two octaves and five dozen bottles of bottled ale (quantities declared by the Act to be wholesale); 2, for selling without license a cargo of spirituous liquors, being at the time of sale in a bonded warehouse in the original packages, and customs duties not being paid; 3, for selling by wholesale ninety octaves in a warehouse, duties paid; 4, for selling without license a thousand gallons of beer, being a brewer; 5, a similar conviction against a distiller, the liquor being in a bonded warehouse, subject to excise duties unpaid.

Held, per WEATHERBE, SMITH, and TOWNSHEND, JJ., that the regulation of wholesale licenses, and distillers' and brewers' licenses, was within the legislative authority of the provincial legislature, the case of *Severn* v. *The Queen*, 2 S. C. R. 70, being practically overruled; but *per* WEATHERBE, J., that the restriction requiring a petition from ratepayers in order to a license was *ultra vires*.

Per MCDONALD, C.J., and RITCHIE, J., that all the convictions should be quashed, those of the brewer and distiller on the authority of *Severn* v. *The Queen*, and the others on the ground that the regulation of the wholesale trade is *ultra vires* the provincial legislature.

Per RITCHIE, J., that although there is a difficulty in drawing the line between wholesale and retail, yet as the Act itself defines wholesale, all restrictions as to sales of the quantity so defined are *ultra vires*.

WILLISTON v. LAWSON.

Specific performance—Vendor and purchaser—Consensus ad idem—Term not definitely arranged.

An agreement was entered into for the sale and purchase of land, the memorandum signed by the purchaser containing a clause, "terms and deeds to be arranged and signed by the 1st May next;" and that signed by vendor, "terms, deeds, etc., to be arranged by 1st May next." It was contended that the terms, etc., had been subsequently arranged, and evidence was given of certain terms communicated by the vendor to the purchaser's solicitor, but on the evidence it appeared that the terms so communicated were only those already agreed upon before the memoranda above mentioned were drawn up. The property to be sold consisted of a block of land in the city, partly in possession of tenants and subject to a mortgage for a large sum covering other land not included in the sale.

Held, that the parties were not *ad idem*, the terms of the bargain not being definitely arranged.

REGINA v. GOUGH.

Justice of the peace—Adjournment sine die—Summary conviction—Evidence taken after trial—Second offence.

On a trial for an offence under the Liquor License Act, 1886, the justice at the close of the evidence adjourned to no particular day for the purpose of giving judgment. On a subsequent day he gave notice in open Court that he would give judgment on the following day, and the defendant being then present was called and examined as to a previous conviction, his solicitor not being present. Judgment was given on the day appointed, convicting for a second offence.

Held, that the conviction was bad.

Per GRAHAM, E.J., that the conviction was bad because the justice did not first find the defendant guilty of an offence before inquiring as to the previous conviction.

REGINA v. FREEMAN.

Canada Temperance Act—Repeal of 49 V. c. 31, bringing the Act into force in non-license counties—Effect of.

In the county of Annapolis there were no licenses in force at the time the Canada Temperance Act was passed, and under the decisions of this Court no time could be assigned at which the Act should come into force. To remedy this defect the Dominion Act of 1886, c. 31, was passed, fixing a time when the Act should come into force. This Act was repealed by the Dominion Revised Statutes.

Held, that the Canada Temperance Act, having been brought into force by the Act of 1886, remained in force notwithstanding the repeal of that Act.

NEW BRUNSWICK.

In the Supreme Court.

[24TH JUNE, 1892.

SANDALL v. WILSON.

Municipal corporation—By-laws—Carting license—Chamberlain proper party to bring action for penalty—Freeman not exempt from license.

This was a suit brought in the City Court of Saint John by the chamberlain of the city to recover the penalty provided by a by-law of the city for using a dray for hire without license, and in which judgment was given against the defendant. Upon appeal it was objected: (1) that the action was improperly brought in the name of the chamberlain and should have been brought in the name of the city corporation; and (2) that the defendant being a *freeman* of the city of St. John had a right to exercise the occupation of carting without a license and that the by-law did not apply to him.

Held, that all doubts as to the first point are removed by 52 V. c. 27, s. 158, which expressly declares that the by-law of 1884 relating to hackney carriages and vehicles—the one under which this action was brought—was in force in May, 1889, and that prosecutions for the recovery of the penalties for violation of any of the provisions of that by-law might be brought in the name of the chamberlain of the city; and also that the same Act declares all the by-laws in force at the time the Act passed to be in force, and therefore necessarily repeals such parts of the Act 33 V. c. 4 as are inconsistent therewith.

I. Allen Jack, Q.C., for the plaintiff.

S. B. Bustin, for the defendant.

CARMAN v. MORRISON.

Writ of capias—Indorsement on—Name of Judge not indorsed—C. S. N. B. c. 37.

The defendant was arrested on a writ of capias issued under the order of KING, J. The indorsement on the writ did not state, as directed by C. S. N. B. c. 37, schedule A, No. 2, the name of the Judge who made the order for trial, but merely stated "Bail for $— by Judge's order," adding the date. After the arrest, KING, J., on the application of defendant, set aside the arrest and ordered the bail bond to be cancelled, and this was a motion to rescind such order. The Court divided equally on the question, but it was intimated that it would be safer to follow the direction of the statute.

George W. Allen, for the plaintiff.

W. B. Wallace, for the defendant.

Ex parte GALLAGHER.

Common schools—Insufficient accommodation—Trustees refusing permits—Mandamus.

This was an application for a mandamus to compel the trustees of schools for the town of Woodstock to grant permits to children for whom the applicant acted as guardian, residing in that town. It appeared from the affidavits produced that application for permits had been made, and refused by the School Board, on the alleged ground that there was not sufficient school accommodation in the town to admit more pupils.

Held, that it was the duty of the trustees to provide sufficient school accommodation for all pupils in the town desiring to attend the common schools, and that the rule must be made absolute.

J. J. Gallagher, for the applicant.

J. A. Vanwart, Q.C., *contra*.

GIRVAN v. McLEAN.

Evidence—Certified copy of deed—When notice should expire—C. S. N. B. c. 74, s. 14.

This was a motion for a new trial. C. S. N. B. c. 74, s. 14, enacts, *inter alia*, that before a certified copy of a conveyance may be given in evidence "at least six days' notice in writing shall be given to the opposite party." On the trial of this cause the six days' notice expired on a day after the circuit opened, but before the case was called for trial. The evidence was given subject to objection, and was relied upon on the motion for a new trial. The Court divided equally on the question, but it was suggested from the bench that hereafter it would be well to give notice so that the six days would expire not later than the first day of the circuit.

C. J. Sayre, for the plaintiff.

J. D. Phinney, for the defendant.

BOSTWICK v. MILLER.

Judgment quasi non-suit—Setting aside—Delay—Terms.

This was an application by the defendant to set aside a judgment *quasi* non-suit. There had been considerable delay in taking the cause to trial, and a peremptory undertaking given by the plaintiff to proceed to trial, which he failed to do. On the argument several circumstances were urged on behalf of the plaintiff as accounting for the delay.

Held, that, although there had been delay in this case, under all the circumstances the plaintiff was fairly entitled to be allowed in to carry his suit to trial, but only on the following terms: That he pay the costs of the day, of the rule for judgment, and of this application, ten days after taxation, and also enter into a peremptory undertaking to enter the cause for trial at the next circuit.

E. McLeod, Q.C., for the plaintiff.

C. A. Palmer, Q.C., for the defendant.

Ex parte HASHT.

Arrest—Discharge from custody—Disclosure—C. S. N. B. c. 38—Application refused—Res judicata—Certiorari.

This was an application for a *certiorari* to remove the proceedings taken before a County Court Judge, who had made an order discharging B., the defendant, from arrest, and cancelling the bail bond, under C. S. N. B. c. 38.

The facts were, that B., being in custody on bailable process, had made an application for disclosure to the Clerk of the Peace for the county. That officer refused the discharge on the facts disclosed by B. Subsequently a second application was made before the County Court Judge, and at this disclosure it was agreed, instead of taking evidence again, to submit the evidence given before the Clerk of the Peace on the prior disclosure, as if now taken for the first time, there being no other facts to disclose. The County Judge, after hearing counsel, granted the order for discharge of the defendant. The ground taken in this application was that the matter, having been once decided by a competent Court, was *res judicata*.

Held, that the objection was vital, and the rule should be made absolute for a *certiorari* to quash the order for discharge made by the County Court Judge.

George F. Gregory, Q.C., for the appellant.

J. A. Van Wart, Q.C., *contra*.

FLEMING v. CANADIAN PACIFIC RAILWAY CO.

Negligence—Railway-crossing—Reasonable precautions.

This was an action for damages for injuries sustained by the plaintiff from a collision with an engine and tender at a railway-crossing upon a public thoroughfare in the city of St. John. Several tracks crossed the street on a level at this point. It was the practice, when trains were crossing, to lower two sets of gates, one on either side of these tracks. The accident occurred about nine o'clock in the evening, and on that night the gates refused to work owing to a thaw followed by sharp freezing, and instead

a signal man with a red light was stationed between the tracks. The engine and tender were backing into the station from the round-house at Fairville, and were coming along at the rate of four or five miles an hour, the usual rate of speed when the gates were down. The train men knew the gates were not working. They did not see the plaintiff until his waggon had been struck by the tender. The plaintiff did not see or hear the engine till it was upon him. His waggon was smashed, and he received considerable injury. The plaintiff at the time was also coming along at a fair speed.

Held, FRASER and TUCK, JJ., dissenting, that the defendants had not taken all reasonable precautions to warn the public, who were accustomed to the gates, and that instead of one signal man, there should have been at least two—one on each side of the tracks crossing the street.

Damages assessed at $300, and a verdict for that amount ordered for the plaintiff.

Skinner, Q.C., and *Pugsley*, S-G., for the plaintiff.

Weldon, Q.C., for the defendants.

MANITOBA.

In the Queen's Bench.

[THE FULL COURT, 22ND JULY, 1892.

ROFF v. KROCKER.

Replevin—Chattel mortgage—Notice of prior mortgage—Registration where goods "situated"—Mortgagee in good faith for valuable consideration.

Appeal from decision of BAIN, J., *ante*, p. 341.

Held, that the defendants' mortgage was not filed in the proper office.

Held, overruling *King* v. *Kulm*, 4 Man. L. R. 413, that, on the evidence, there could be no doubt that the plaintiff was a mortgagee in good faith, for valuable consideration. He was a creditor of Harder, the mortgagor, having an execution against him in the hands of a bailiff, and the mortgage was taken to secure

payment of the judgment debt. It was not taken collusively in order to assist the mortgagor in placing the horses out of the reach of the defendants or of Harder's other creditors. If the mortgage was taken for a fair consideration and not for a collusive purpose, the plaintiff was undoubtedly a mortgagee in good faith; his having had notice of the defendant's prior but unfiled mortgage was not material and he was entitled to the protection of the statute. The verdict entered in favour of the defendants should be set aside and a verdict entered for the plaintiff, without costs of the motion in term.

SCHULTZ v. FRANK.

Real Property Act—Petition by married woman—Necessity for next friend—Right to file new petition—Discretionary power in Judge.

This was an application to reverse an order made by the Chief Justice, dismissing a petition upon a caveat under the Real Property Act. The petition showed that the petitioner was a married woman. When the petition came up for hearing it was objected that she should have petitioned by next friend, and an adjournment was granted to enable the petitioner to have one appointed; and as this was not done within the time allowed, a further peremptory enlargement was granted for the same purpose. On the day to which the latter enlargement was made, and before the petition came up for hearing, the petitioner sought to have a next friend appointed *ex parte*, which was refused, and a summons for the purpose was granted; but upon the adjourned hearing of the petition no sufficient excuse for the delay having been shown, the petition was dismissed.

Held, per KILLAM and BAIN, JJ., that the application must be dismissed with costs.

As the petition came before the Court, it was, in any view, improperly constituted. It was not by husband and wife; it was not by the wife by a next friend; it did not show that it was in respect of separate estate, whether statutory or otherwise.

It would appear that the caveatee, having appeared on the petition and shown cause that the petition was defective, was in the position of a party who had appeared to a bill, in which case, where a new next friend is to be named in the place of a deceased next friend, it can be done under an order as of course to amend; but in other cases the order to appoint a new next friend is special, and must be obtained either on motion, or on summons on notice, and that the principle thus stated applies to the appointment of a next friend where the bill has been presented without one. It would be competent for a Judge upon the hearing or adjournment of the hearing, if the proper material were before him, to order the amendment by the insertion of the name of a particular next friend without summons, but, of course, only after a proper adjournment to enable the respondent to make any necessary inquiries; but it was impossible for the Court to say that the learned Chief Justice erred in directing a summons, or in disposing of the case as he did, if it were one for the appointment of a next friend.

Held, per DUBUC, J., as it did not clearly appear on the face of the petition that the property in question was the separate property of the caveator, it was necessary to have a next friend appointed. The learned Chief Justice, having all the circumstances before him, acted in the exercise of his discretionary power, and on this ground his order could not be reversed.

The dismissal of the petition in this case should not estop the caveator from filing a new one.

Proceedings should be stayed for a week to allow the caveator to file a new petition, without prejudice to the right of the caveatee to oppose the petition on any grounds he may be advised to take in the matter.

Elliott, for the caveator.

Ewart, Q.C., for the caveatee.

MACDONALD v. CUMINGS.

Attachment of debts—Garnishing creditor—Execution creditor—Priorities—Surplus goods sold at request of debtor—Goods in custodia legis—Sheriff.

Appeal from the decision of TAYLOR, C.J., *ante*, p. 180.

Held, that there must be a new trial of the issue directed in the County Court. There was some discrepancy in the evidence of the different witnesses respecting the terms of sale. The right of the second execution creditor appeared to depend wholly upon the time when the property passed to the purchaser. Upon this point the Judge of the County Court did not appear to have found. There should be a new trial, but without costs to either party, of this application, or of the appeal, or of the trial of the issue.

[TAYLOR, C.J., 11TH JULY, 1892.

RUDDELL v. GEORGESON.

Crown lands—Sale of, for taxes before patent issued—Subsequent issue of patent to assignee of original purchaser from the Crown.

The bill in this case alleged that in 1881 the land in question was part of the unappropriated Dominion lands open for sale, and that on 19th October, 1881, William Beech agreed to purchase the same, paid a large proportion of the purchase money, and thereby became entitled to an estate or interest in the land and, upon payment of the price agreed to be paid, to have a Crown patent therefor issued to him or his assigns. Under several mesne conveyances the interest of Beech became vested in the defendant. Taxes for the years 1883 to 1886 being unpaid, the land was, on 26th July, 1887, sold for taxes, and bought by the plaintiff, who, on 28th July, 1889, obtained from

the municipality a tax deed of the land. That in pursuance of the agreement of sale entered into by Beech, and by virtue of the several deeds set out the defendant acquired the position of Beech, paid the balance of the purchase money, and procured the Crown patent of the land to be issued to him on 20th October, 1891, as purchaser of the land pursuant to the original agreement. It was also alleged that the money paid to complete the purchase was the money of Beech, that he procured the patent to be issued to the defendant, believing that thereby the land would be held freed from taxation and from the tax sale; and that the defendant held the patent as trustee for Beech. Proceedings were taken by the defendant to bring the land under the provisions of the Real Property Act, when the plaintiff filed a caveat.

The bill prayed for a declaration that the defendant held the legal estate in the land as trustee for the plaintiff.

The defendant demurred, contending that the land, not having been patented, was not liable to taxation, and could not be sold; but that, if the land were taxable, the purchaser only acquired such interest as the Crown might be willing to recognize, and the issue of the patent to the defendant showed that the Crown had refused to recognize any interest in the plaintiff.

Held, that the demurrer must be allowed. Assuming that the estate or interest of Beech, or his assignee, was subject to taxation, he had only a limited or partial interest, and all that the purchaser at the tax sale could acquire was that estate or interest so far as the Crown might be willing to recognize or admit it.

There was no allegation in the bill that the Crown, in issuing the patent to the defendant, as assignee of Beech, was in anyway imposed upon, or that any fraud was perpetrated upon the Crown. The Crown was free to recognize such right as the plaintiff acquired under the tax deed, or to disregard it and recognize the defendant as the person entitled to the patent. Having done the latter, the fact that thereby the defendant was enabled to hold the land free from the taxes which had been imposed and from the consequences of the non-payment of these, was no ground for this Court interfering.

Howell, Q.C., and *Cumberland*, for the plaintiff.

Tupper, Q.C., and *Phippen*, for the defendant.

A. v. B.

Mortgage suit—Agreement to pay interest at mortgage rate, post diem—Petition to vacate decree—Surprise—Discovery of fresh evidence.

This was a suit brought to foreclose a mortgage. The defendants allowed the bill to be taken *pro confesso*, but they attended on the taking of the accounts in the Master's office. The Master's report, dated 31st July, 1891, found a large amount due to the plaintiffs, which included interest at nine per cent. per annum, the rate reserved by the mortgage, after the day on which the principal money had become payable. From this report the defendants appealed, on the ground that, from the time when the principal money became payable, the plaintiffs were entitled to six per cent. only, and on 11th November, 1891, their appeal was allowed.

The plaintiffs then presented a petition to have the decree vacated, and for leave to amend their bill. They based their claim to this relief on the grounds that they were taken by surprise, when, in the Master's office, the defendants raised the contention that interest at nine per cent. was not payable after the due date of the mortgage, and that on 20th November, 1891, they discovered, among the papers in their solicitor's office, a letter dated 26th October, 1888, signed by one of the defendants, the original mortgagor, in which he agreed to pay interest on his mortgage, "at nine per cent. per annum until the 21st October next, or so long as you allow the same to stand."

It was claimed that the plaintiffs were misled and taken by surprise, because, at interviews between the agents of the plaintiffs and the solicitor for the defendants, in 1888, he wanted the interest reduced to eight per cent., which was agreed to on reduction of the principal, but if the principal was not reduced, and the arrears paid up, the mortgage was to continue to bear interest at nine per cent.

As to the discovery of new evidence, it appeared that in the end of 1890 steps were taken to exercise a power of sale in the mortgage, and papers for service on the defendants were sent to a firm of attorneys at Seattle, U. S. A., which were returned, as service could not be effected. When this suit was begun, all papers connected with the mortgage were handed to the plaintiffs' solicitors.

On 20th November, 1891, after the appeal had been disposed of, an agent of the plaintiffs, going over the papers with the plaintiffs' solicitors, looked into an envelope found among them, which from the printing upon it, the post mark and postage stamp, had evidently come from the attorneys in Seattle, and found in it the letter of 26th October, 1888. How it came to be there no one seemed to know. The genuineness of the document seemed unquestioned. It had all the time been in the plaintiffs' possession. The solicitor stated he was not aware of its existence until the agent showed it to him on the 20th November. The agent stated he knew of its existence at the time it was written, but had forgotten it.

The question was, were the plaintiffs entitled to have the proceedings opened on the ground of surprise and discovery of new evidence? Would they, under the circumstances, be entitled to a new trial at law?

Held, that no sufficient case had been made for granting what the plaintiffs asked, and the petition must be dismissed with costs, to be set off against the amount due from the defendants.

Unless newly discovered evidence was shown to be material, a new trial would not be granted. Evidence of the materiality must be accompanied by evidence of previous diligence. It could not be said the plaintiffs were taken by surprise, nor that the evidence sought to be brought forward was evidence which could not, with due diligence, have been discovered earlier.

The petition went further than to ask an opening of the hearing before the Master, or a reference back to him. It sought to vacate the decree, and to allow an amendment of the bill for the purpose of setting up an additional claim. No case was made for that. The plaintiffs could not add this additional interest to their claim so as to make it a charge on the land. The letter was signed by one defendant only, and the other defendant, his wife, was the owner of the equity of redemption. It could only be a claim again the defendant who signed the letter, the original mortgagor, personally. He was liable under his covenant, and the plaintiffs were pressing him for payment. In consideration of their forbearing for a time he agreed to pay nine per cent. during the time of forbearance, and it was to be supposed the plaintiffs could sue upon this agreement. If so, they could get all the relief they could have if the prayer of their petition were granted.

[DUBUC, J., 28TH JUNE, 1892.

McLENAGHAN v. HETHERINGTON.

Mortgage—Action on covenant—Statute of Limitations—Land outside the jurisdiction—Decisions of English and Ontario Courts, where different, on same law.

The plaintiff sued upon a foreign judgment obtained in Ontario in 1878, on a covenant in a mortgage; also for that the defendants by deed dated 20th October, 1874, covenanted with the plaintiff to pay to the plaintiff $200 with interest.

The defendants pleaded that the plaintiff's claim in the second count of the declaration mentioned was a sum of money secured by mortgage upon certain lands, and this suit was brought to recover the same, and the alleged cause of action did not accrue within ten years of suit.

The plaintiff replied that the lands referred to in the plea were not, and were not at the date of the mortgage, within the Province of Manitoba.

The defendants demurred to the replication.

The question raised was whether the provisions of R. S. M. c. 89, s. 24, applied to a covenant in a mortgage upon lands outside the Province of Manitoba as well as upon lands within the Province. The statute provides that "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, but within ten years next after the present right to receive the same accrued to some person capable of giving a discharge for the release of the same," unless in the meantime, some part has been paid or some acknowledgment given, and in such case no action shall be brought but within ten years after payment or acknowlegment.

Held, that the provisions of the statute R. S. M. c. 89, s. 24, with respect to money secured by mortgage upon land, should be held to apply to any land, as well outside as within the Province.

The demurrer should be allowed with costs.

Where the decisions of Courts of sister Provinces are at variance with English decisions, on questions where the law is substantially the same, in Imperial and Provincial legislation, the doctrine adopted by the English courts should be followed.

Howell, Q.C., for the plaintiff.

Macleod, for the defendant.

[BAIN, J., 2ND JULY, 1892.

CHARLEBOIS v. GREAT NORTH-WEST CENTRAL RAILWAY CO.

Railway company—Bill filed on foreign judgment—Demurrer—Power of company to give lien on road—Third parties—Jurisdiction—Parties within, but land beyond jurisdiction.

The plaintiff's bill alleged that the defendants were a duly incorporated company, with their head office at Ottawa in Ontario, and the chief officers of the company resided in Ontario; that the company entered into an agreement with Her Majesty the Queen to build a line of railway from a point in Manitoba to Battleford in the N. W. T., for which the company was to receive a land grant; that the plaintiff agreed to build and equip the first fifty miles of the road, which he duly completed; and that under the terms of the agreement he became entitled to a lien on and to hold the railway and the franchise, rolling stock, land grant, etc., as security for the amount due him; that in September, 1891, the plaintiff recovered a judgment against the company in Ontario, by consent of the defendants, by which it was declared that the plaintiff had a lien on the railway, land grant, etc., and it was ordered that the defendants should within six months pay the amount due with interest. The judgment declared that, at the request of the plaintiff, certain specified amounts of the sum due were to be paid to certain named third parties, and the fund was charged with these payments as a first

charge, and the judgment recited or declared that these third parties accepted the provisions of the judgment in full of all other liens then claimed by them. The second charge was a sum in favour of the plaintiff. The judgment further ordered that in default of payment, the plaintiff might proceed to exercise all his rights against the company, his rights being those of a mortgagee with judgment for sale, and that until default the defendants should have possession of the railway subject to the plaintiff's lien, and subject to his right to have possession upon default. The bill further alleged that the plaintiff, pursuant to the judgment, delivered up possession of the railway to the defendants, and that they had been in possession ever since; that the company had made default in the performance of the terms of the judgment, and had not paid the plaintiff the amount found due by the judgment; that after the company had made default, the plaintiff, in February, 1892, obtained a second judgment in the Court in Ontario, for the purpose of enforcing the first judgment; that by this judgment it was ordered that the company should forthwith deliver up possession of the railway, land grant, etc., to the plaintiff and all the company's rights thereto, and the company were restrained from selling or negotiating their lands, and from exercising any acts of possession or ownership over the railway, and from interfering with the plaintiff in his possession and control thereof. The bill then set out that the company had not paid the amount directed by the second judgment, and that they had refused to deliver up the possession of the railway, etc., to the plaintiff.

The bill therefore prayed that the company might be ordered to pay the amount found due by the judgments; that the company be ordered forthwith to deliver up possession of the railway, rolling stock, etc.; that the company be restrained from alienating or incumbering the railway, land grant, etc.; and that the company might be ordered to specifically perform and carry into effect the terms and conditions imposed upon them by the two judgments of the Ontario Court.

The defendants demurred to so much of the bill as sought payment of the money directed by the judgments to be paid to persons other than to the plaintiff, and to so much of the bill as sought to obtain an order for the delivery of the possession of the railway, etc., to the plaintiff, on the ground that the third persons mentioned in the judgment were necessary parties to the

suit. They also demurred for want of equity to so much of the bill as sought to restrain the defendants from alienating or otherwise disposing of the railway, land grant, etc. There was further a demurrer for want of equity to the whole bill except so much of it as sought to recover payment of the money ordered by the judgment to be paid to the plaintiff and a demurrer to the whole bill for want of equity and for want of parties.

The main contention of the defendants was that the clause in the contract by which the plaintiff was given a full and complete lien and first charge over the fifty miles of railway, land grant, etc., until he was paid the sum due, was *ultra vires* and void, and that, therefore, neither this clause nor the judgments in the Ontario Court gave the plaintiff any equity to ask for an order for the delivery of possession of the road or for restraining the defendants from alienating or incumbering it, etc.

Held, that the general demurrer to the whole bill for want of equity and for want of parties must be overruled, because the plaintiff would be entitled, at all events, to a decree for the payment of the amount due by the defendants to the plaintiff, and which, by the judgments in the Ontario Court, the defendants were ordered to pay to himself personally.

There was nothing in the bill to show that any of the third parties mentioned in the judgment were entitled to a lien on the railway, etc. The demurrer as to the part of the bill that asked for an order for the delivery of the railway to the plaintiff, because these third persons were not made parties must also be overruled. It could not be said, at this stage of the proceedings, that they were necessary parties to the suit.

Held, following *Bickford* v. *Grand Junction R. W. Co.*, 1 S. C. R. 697, that an express power to borrow and to give specified securities will not negative or exclude a general power a company has to give other securities for purposes within the scope of the powers conferred upon the company to construct and operate a railway. The Court in Ontario had assumed the agreement in this case to be valid. If the agreement for the lien was valid then the plaintiff was entitled to some part, at any rate, of the relief he asked.

The Courts in Ontario might have had jurisdiction to make the decrees they did, but there was no authority that would

enable the plaintiff to require that this Court here should recognize and give effect to the orders of the Ontario Courts in respect of the railway and land in Manitoba: *Norris* v. *Chambres*, 30 L. J. Ch. 285.

A demurrer must be taken as a whole; and if it appears that the plaintiff is entitled to any relief under the part of the bill demurred to, the demurrer must be overruled.

All the demurrers must be overruled.

Howell, Q.C., and *Cumberland*, for the plaintiff.

Culver, Q.C., and *Bradshaw*, for the defendants.

ROTHWELL v. MILNER.

Sale of goods—Glandered horse—Want of knowledge of infection—Caveat emptor.

Appeal from a County Court. The plaintiff sued the defendant for a balance of $190; he had traded two geldings for a mare which the defendant owned; it subsequently transpired that the mare had glanders, when she was quarantined and then shot. The plaintiff claimed the value of the geldings and amounts paid for treating the mare, food, medicine, etc., less $100, the amount received from the municipality, because of the mare having been shot under the provisions of the Act respecting diseases of animals.

The County Judge found that at the time of the trade neither the plaintiff nor the defendant knew, or had cause for suspicion, that the mare was infected with glanders, although she was, as a matter of fact, so infected. She had only been in the defendant's possession for a week when the trade took place. He held that the plaintiff could not recover. The plaintiff appealed.

Held, that the appeal must be dismissed with costs.

The plaintiff had the opportunity of examining the horse when he bought it, and there was no fraud or misrepresentation on the part of the defendant. It was not contended that there was any warranty given, and so, whether or not the defendant in selling the horse made himself liable to a penalty under the statute, as between him and the plaintiff, the rule of *caveat emptor* must apply, and the plaintiff was not entitled to recover.

A. Macdonald, for the plaintiff.

C. H. Campbell, for the defendant.

[20TH JULY, 1892.

SUTHERLAND v. MANNIX.

Replevin—Title under hire receipt note—Act respecting lien notes—Construction of.

Appeal from a County Court.

Action of replevin to recover possession of a mare. The defendant claimed title under a hire receipt note given for the mare, which was hired from one Winsor. The plaintiff claimed title under the hire receipt note as assignee of Winsor.

The decision of the case turned on the construction of s. 2 of the Act respecting lien notes, R. S. M. c. 87, which provides that receipt notes, hire receipts, and orders for chattels given by bailees of chattels, where the condition of the bailment is such that the possession of the chattel should pass without any ownership therein being acquired by the bailee, were and shall be only valid in the case of manufactured goods or chattels, which at the time the bailment is entered into have the manufacturer's name, or some other distinguishing name, printed or stamped thereon or otherwise plainly attached thereto; and such bailment shall be valid unless it be evidenced in writing, signed by the person thus taking possession of the chattel.

The construction placed upon this section by the County Court Judge was that it makes all the notes and hire receipts referred to in it invalid and void as against purchasers in good faith, except those taken for manufactured goods having the manufacturer's or some other distinguishing name imprinted thereon.

Held, doubtful if this be the correct view to take of the section, but, at all events, the note in question did not seem to come within the terms of the section or to be affected by it. The section applied to notes, etc., when the condition of the bailment was such that the possession of the chattel should pass without any ownership being acquired by the bailee; here the condition was that the right of property and the right of possession should both remain in the vendor or holder of the note.

Appeal allowed with costs. The verdict entered for the defendant set aside and a verdict entered for the plaintiff.

C. P. Wilson, for the plaintiff.

Bonnar, for the defendant.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 13TH JUNE, 1892.

In re SOLICITOR.

Solicitor and client—Taxation of costs—Joinder of causes of action—Rule 300—Separate actions—Solicitor not entitled to costs of—Duty of solicitor.

A solicitor, acting on behalf of three clients, brought three separate actions for malicious prosecution against the same defendant. The three causes of action all arose out of an information for an assault laid by the defendant against the plaintiffs.

Held, that under Rule 300 the three causes of action could have been joined in one action; that it was the duty of the solicitor to have so advised his clients; and that not having done so, he could not be heard to say that his clients had instructed him to bring three separate actions. And upon taxation of his bill between solicitor and client he was allowed costs as of one action only.

Booth v. *Briscoe*, 2 Q. B. D. 496, and *Gort* v. *Rowney*, 17 Q. B. D. 625, followed.

Appleton v. *Chapel Town Paper Co.*, 45 L. J. Ch. 276, not followed.

Masten, for the solicitor.

J. B. O'Brian, for the clients.

ARMSTRONG v. HEMSTREET.

Assignments and preferences—R. S. O. c. 124, s. 3, s-s. 1—Payment of money to a creditor—Transfer of cheque.

The handing by a debtor to his creditor of the cheque of a third person upon a bank in the place where the creditor lives, the maker of the cheque having funds there to meet it, is a "payment of money to a creditor" within the meaning of R. S. O. c. 124, s. 3, s-s. 1.

Judgment of FERGUSON, J., affirmed.

Gibbons, Q.C., for the plaintiffs.

G. T. Blackstock, for the defendant Murray.

PATTERSON v. SMITH.

Pleading—Defence arising after action—Confession—Judgment—Rule 440—"Otherwise order."

In a action against a judgment debtor and his brother to set aside a conveyance by the former to the latter as fraudulent, both defendants pleaded several defences. Afterwards the judgment debtor applied for leave to amend by adding as a defence, without abandoning his other defences, that since action the judgment debt had become extinguished by reason of a set-off ordered in another action.

Held, a case in which the plaintiff should not be allowed to confess the new defence and sign judgment for his costs under Rule 440, but one in which the Court should otherwise order under the last clause of the Rule.

Construction and history of Rule 440.

Harrison v. *Marquis of Abergavenny*, 57 L. T. N. S. 360, discussed.

Pepler, Q.C., for the plaintiff.

W. R. Smyth, for the defendant Albert I. Smith.

In re SOLICITOR.

Solicitor and client—Delivery of bill of costs—Supplemental bill—Inadvertence—Special circumstances.

A solicitor is bound by the bill which he delivers, and he cannot as of course withdraw it or substitute another bill or reduce his demand or deliver a bill containing other charges; but if he wishes to do so he must make a special application for leave.

A solicitor in delivering a bill omitted to make any charge for "days employed in going to and returning from Ottawa" upon professional business. He stated that the omission was through inadvertence.

Held, not a "special circumstance" justifying an order for leave to deliver a supplemental bill.

F. E. Titus, for the solicitor.

E. T. Malone, for the clients.

[FALCONBRIDGE, J., 1ST AUGUST, 1892.

In re WALKER & DREW.

Will—Construction—Devise—Estate in fee—"Absolutely"—"In the event of her death"—R.S. O. c. 109, s. 30.

A testator, who died on the 9th April, 1891, by his will devised and bequeathed all his real and personal estate to his wife absolutely, and in the event of her death to be equally divided among his children.

Upon a petition under the Vendor and Purchaser Act respecting lands of which the testator died seised in fee:—

Held, that the wife took under the will an estate in fee simple in the lands. The will was to be construed as if the words "in my life time" followed the words "in the event of her death."

Construction of s. 30 of the Wills Act, R. S. O. c. 109.

A. H. Marsh, Q.C., for the vendor.

J. M. Clark, for the purchaser.

CHANCERY DIVISION.

[STREET, J., 6TH JULY, 1892.

PATTERSON v. TANNER.

Mortgage—Power of sale—Exercise of—Obligation to carry out sale—Effect of not doing so.

A mortgagee, having exercised the power of sale in a mortgage and sold the land for sufficient to pay the mortgage and costs, cannot without sufficient reason treat the sale as a nullity, and fall back on the mortgage as if the exercise of the power was a mere matter of form.

Three joint owners of property mortgaged it to a loan company, and then sold to the plaintiff, who covenanted to pay off the mortgage. The plaintiff sold to the defendant in the same way, taking a similar covenant. The company exercised the power of sale in their mortgage, and one of the original owners became the purchaser at a price sufficient to pay the mortgage and costs.

The purchaser not being willing to carry out the sale, the company did not insist on his doing so, but collected by threats of legal proceedings the arrears and costs from the plaintiff.

In an action by the plaintiff to recover from his vendee, the defendant, the amount thus paid:—

Held, that he could not recover.

E. D. Armour, Q.C., for the plaintiff.

A. Elliott, for the defendant Tanner.

A. McLean Macdonell, for the defendant McArthur.

IN CHAMBERS.

[BOYD, C., 15TH JUNE, 1892.

FISHER v. CASSADY.

Writ of summons—Service out of jurisdiction—Rule 271 (e)—Breach of contract—Performance within Ontario—Sale of goods—Inspection of bulk.

The defendants, in British Columbia, by letter, offered to sell the plaintiff, in Ontario, a car-load of lumber, according to a

sample previously furnished, at a certain price, free on board cars at Toronto. The plaintiff accepted the offer by letter, and it was agreed between the parties that the lumber was to be shipped at Vancouver and delivered at Toronto, upon which being done the price was to be paid by means of a draft. When the lumber arrived at Toronto the plaintiff inspected it and refused to accept it or the draft on the ground that it was not up to sample. He then brought this action for damages for breach of the contract.

Held, that the plaintiff had the right to make inspection of the bulk at Toronto before accepting or paying; and the contract was one which, according to its terms, ought to be performed within Ontario; and therefore service out of the jurisdiction of the writ of summons ought to be allowed under Rule 271 (*e*).

W. T. Allan, for the plaintiff.

J. A. MacIntosh, for the defendants.

NOVA SCOTIA.

In the Supreme Court.

REGINA v. McKENZIE.

Constitutional law—Nova Scotia Liquor License Act, 1886—Intra vires—Procedure thereunder—Summary conviction—Justices of the peace—Certiorari—Affidavit—52 V. c. 17, s. 7—Hard labour—Information—Summons—Second offence—Service on defendant—Jurisdiction—Return to certiorari—Amended conviction.

The retail clauses of the Liquor License Act of 1886 are *ultra vires*; WEATHERBE, J., dissenting.

Held, *per* TOWNSHEND and GRAHAM, JJ., that s. 7 of c. 17 of the Acts of 1889, requiring an affidavit before the issue of a writ of *certiorari* to remove a conviction under the Liquor License Act, 1886, applies even where the justice acts without jurisdiction.

Per RITCHIE, J.—The section does not apply in such cases.

Per RITCHIE, J.—It is a fatal objection to a conviction under the Act that it imprisons without mentioning hard labour.

Per RITCHIE, J.—Under s. 87 as amended, both justices should be present when the information is laid and summons granted, but only one need sign the information, and the conviction should show on its face the facts necessary to give jurisdiction to the one not signing.

Per RITCHIE, J.—Where the conviction is for a second offence, it must appear from the evidence that the offences were committed on different days, and also where the first information covered the whole period of ninety days before the information, that the second offence was committed after the information laid for the first.

Per RITCHIE, J.—Where the summons was left at the defendant's place of business an hour or two before it was returnable, and the defendant swore he never received it, and the trial was adjourned, but no notice given the defendant other than a verbal measage through the constable that he was instructed by some one, not shown to be connected with the prosecution, to tell him that "his case would come up on Monday at 10 o'clock":—

Held, that the justice had no jurisdiction.

Per RITCHIE, J.—When a bad conviction is made, a good conviction cannot be made and returned to the writ of *certiorari* after the conviction has been filed in the police office, and the *onus* of showing that the bad conviction was not filed before the *certiorari*, is on the party endeavouring to sustain the conviction, the presumption being that it was filed.

HART v. McLEAN.

Fraudulent conveyance—Setting aside—Appeal—Form of decree—Creditors.

Deed set aside as a fraud on creditors, and decree, which was to set the deed aside generally, modified so as to relate only to the plaintiffs' claim, no appeal having been taken from the form of the order. No costs allowed on the appeal; MEAGHER, J., dissenting.

MANITOBA.

In the Queen's Bench.

[TAYLOR, C.J., 29TH AUGUST, 1892.

MANITOBA AND NORTH-WEST LOAN CO. v. BARKER.

Mortgage—Rate of interest post diem.

This was an action upon a covenant in a mortgage to recover a balance claimed to be due after the land comprised in the mortgage had been sold under a power of sale. The mortgage was dated 24th February, 1883, and secured payment of $1,400 principal, with interest at ten per cent. and compound interest as therein provided, the principal to be repaid on 1st July, 1888, and interest half-yearly on each first day of July and January on so much principal money as should from time to time remain unpaid till the whole of the principal money should be paid.

There was also a proviso, "that in case default shall be made in payment of any sum to become due for interest at any time appointed for payment thereof as aforesaid, compound interest shall be payable, and the sum in arrear for interest from time to time shall bear interest at the same rate as the principal money secured by these presents, and in case the interest and compound interest are not paid in six months from the time of default a rest shall be made and compound interest shall be payable on the aggregate amount then due, and so on from time to time, and all such interest and compound interest shall be a charge on the land."

The main question in dispute was as to the rate of interest to be allowed since the 1st of July, 1888, when under the terms of the mortgage the principal became payable. The plaintiffs claimed ten per cent. compounded half-yearly. The defendant insisted that since the principal became due he could be charged only six per cent. simple interest.

Held, that the defendant's contention was the correct one. The interest should be computed at ten per cent. compounded half-yearly up to the 1st day of July, 1888, and after that at six per cent. simple interest. In the absence of express words showing that the parties contemplated payment, not *ad diem*, but *post*

diem, the Court ought not to presume that they intended to make provision for a breach of the covenant.

Aikins, Q.C., for the plaintiffs.

Munson, for the defendant.

[KILLAM, J., 29TH JULY, 1892.

MASSEY & CO. v. PERRIN.

Promissory note—Proviso—Power to declare payable at any time.

Appeal from a County Court.

The plaintiffs sued upon two promissory notes, both dated 25th April, 1891, one payable on or before the 1st day of December, 1891, the other payable on or before the 1st day of December, 1892. Each of the notes contained a proviso that, "if for any good reason Massey & Co. should consider this note insecure, they have full power to declare it, and all other notes made by me in their favour, due and payable at any time." The County Court Judge entered a verdict for the plaintiffs on the first note, and a nonsuit on the second note.

The plaintiffs appealed. The evidence showed that the plaintiffs, on 25th March, 1892, declared the second note due because the first one was unpaid.

Held, that the terms of the notes gave the plaintiffs power to make them payable and actionable, upon happening of any of the events mentioned, before maturity by effluxion of time. One of the contingencies did occur, the defendant did make default in payment of a "note" in the plaintiffs' favour, for, whether the instruments were or were not negotiable promissory notes, each of them was a "note" within the meaning of each instrument, as the word was used to describe each of them.

It did not appear important to consider the question whether the instruments sued on were negotiable promissory notes. The contents were given in full, as required by the County Courts Act, R. S. M. c. 33, ss. 94, 95. They showed on their face that they were made for consideration, which appeared to be sufficient for the purposes both of the statement of claim and of evidence.

Culver, Q.C., for the plaintiffs.

C. P. Wilson, for the defendant.

Supreme Court of Canada.

ONTARIO.] [28TH JUNE, 1892.

WILLIAMS v. TOWNSHIP OF RALEIGH.

Municipal corporations—Exercise of municipal powers—Municipal Act, R. S. O. c. 184, ss. 483, 569, 583, 586—Drainage of flooded lands—Lands injuriously affected—Remedy—Arbitration—Mandamus—Notice.

Certain lands in the township of Raleigh were drained by what were called the Raleigh Plains drain and Government drain No. 1. The ratepayers petitioned for further drainage under the Municipal Act, R. S. O. c. 184, and a surveyor was directed under s. 569 of the Act to examine the locality, make plans, and report as to how the drainage could be effected. In pursuance of his report the municipality caused a number of drains to be constructed leading into the Raleigh drain and Government drain No. 1, with the result that the additional volume of water proved too great for the capacity of the latter, which overflowed and flooded the adjoining lands of C., who brought an action for the damage thereby occasioned. The matter was referred to a County Court Judge, who reported the facts in favour of C., and against the contentions of the municipality, and estimated the damages at $850. FERGUSON, J., affirmed this finding and also ordered a mandamus to issue under s. 583 of the Act. The Court of Appeal reversed this decision, holding that the only remedy for the damage to C.'s land was by arbitration under the statute and that he was not entitled to a mandamus: 11 Occ. N. 236.

Held, reversing the judgment of the Court of Appeal, that the right infringed by the municipality being a common law right and not one created by the statute, S. was not deprived of his right of action by s. 483 of the Act, which provides for the

determination by arbitration of a claim for compensation for lands injuriously affected by the exercise of municipal powers.

Held, further, that the municipal council had a discretion to exercise in regard to the adoption, rejection, or modification of the report of a surveyor appointed under s. 569 to examine the locality and make plans, etc., and if the report is adopted the council is liable for the consequences following from any defect therein.

Held, also, that the council, by the manner in which the drainage work was executed, was guilty of a breach of the duty imposed on it by s. 583 of the Act to preserve, maintain, and keep in repair such work after its construction.

The work having been constructed under s. 583 of the Act, C. was not entitled to a mandamus to compel the municipality to make the necessary repairs to preserve and maintain the same, the notice required by that section not having been given. If the work had been done under s. 586, notice would not have been necessary.

Per STRONG and GWYNNE, JJ.—C. was not entitled to the statutory mandamus, but it could be granted under the Ontario Judicature Act, R. S. O. c. 44.

Held, also, that though s. 583 makes notice a necessary preliminary to the liability of the municipality for pecuniary damage suffered by a person whose land is injuriously affected by neglect or refusal to repair, the want of such notice did not divest C. of his right of action nor affect the damages awarded to him.

The appeal was allowed with costs and the judgment of FERGUSON, J., restored except as to the mandamus.

Robinson, Q.C., and *Douglas*, Q.C., for the appellants.

Matthew Wilson, Q.C., for the respondents.

TOWNSHIP OF SOMBRA v. TOWNSHIP OF CHATHAM.

Municipal corporations—Drainage work—Non-completion—Mandamus—Ontario Municipal Act, R. S. O. c. 184, s. 583—Ontario Judicature Act, R. S. O. c. 44.

The corporation of the township of C. by by-law undertook the execution of a scheme of drainage on a road between the township of C. and the township of S., pursuant to a report of an engineer appointed to examine the land proposed to be drained. A surveyor was appointed to execute the work by

letting it out under contract, which he did, but the contractors were unable to carry it out, and abandoned it. The work was then let in parcels to different contractors. An action was brought against the township of C. by the township of S. and one M., a land-owner whose land was alleged to have been injured by flooding caused by the wrongful and negligent manner in which the drainage work was done. The plaintiffs claimed that the work was never fully executed, and each asked for a *mandamus* to compel the defendants to complete it according to the plans and specifications adopted by the by-law. M. also claimed damages for the injury to his land.

The trial resulted in a judgment for the plaintiffs for all the relief claimed, the decree directing that the work be completed according to the plans and specifications with proper and sufficient outlets at both ends of the drain to carry off all the water entering the same from time to time, the same to be done at the cost of the defendants. To M. was awarded $150 damages. The Court of Appeal (18 A. R. 252) reversed this judgment so far as the township of S. was concerned, and dismissed the action. The judgment in favour of M. was affirmed. The plaintiffs appealed, and the defendants gave notice of cross-appeal against the judgment in favour of M.

Held, reversing the judgment of the Court of Appeal; TASCHEREAU, J., dissenting, and PATTERSON, J., with hesitation; that the township of S. was entitled to retain the *mandamus* or mandatory injunction granted by the original decree, and that they were entitled to such relief, irrespective of s. 583 of the Municipal Act, R. S. O. c. 184, under the Ontario Judicature Act, R. S. O. c. 44; the decree to be varied by striking out the direction that the work should be done at the cost of the defendants, which is only warranted where the original assessment was sufficient to cover the cost; and the fact that the contractors were unable to do the work could only be explained on the assumption that the amount was insufficient; the decree to be further varied by striking out the provision as to outlets and to direct a mandatory injunction to issue requiring the defendants to complete the drain to the width and depth and in the manner provided by the plans and specifications, or providing some substitution therefor under the statute; reserving leave to the plaintiffs to apply for further relief as occasion might require if the work should not be proceeded with as directed.

Under s. 588 of the Municipal Act a *mandamus* only issues where one of two municipalities bound to repair refuses to do so after notice. In such case *mandamus* is a remedy in addition to an action by the owner of property injured by such refusal. Damage from neglect after notice is conclusive evidence of negligence.

The section has no reference to a case in which the drainage work has never been fully completed.

The township of S. could not claim pecuniary compensation for negligence causing injury to private land, or even causing a general nuisance. Their right to such compensation is confined to cost of repairing and restoring roads washed away by floods caused by such negligence.

W. R. Meredith, Q.C., for the appellants.

Pegley, Q.C., for the respondents.

PENMAN MANUFACTURING CO. v. BROADHEAD.

Contract—Manufacture of patented articles—Substitution of new agreement for—Evidence.

B. was the patentee of a machine called the Windsor Loom for making skirtings, etc., and in 1884 she entered into an agreement with the defendant company to supply them with the looms, on which they were to manufacture the goods and pay a royalty of one cent a square yard thereon, the minimum sum for such royalty to be $50 a month. The patent of B. was to expire in 1891. Prior to this agreement, in 1882, B. had granted to P., the head of the defendant company, a license to manufacture blankets under another patent for a like royalty. These agreements were carried out until 1887. In the meantime B. had patented another device for making blankets, and considerable correspondence had taken place between her and the company with regard to the manufacture of the latter patented article, and the company, who had been unable to sell the skirtings, offered to take both patents for a year, paying therefor $1,000 royalty, which B. accepted. At the end of the year B. claimed that the original agreement was still in force and was to continue until the patent expired, and she brought an action for royalties due her under the same.

Held, reversing the judgment of the Court of Appeal; TASCHEREAU, J., dissenting; that the correspondence and other evidence showed that the agreement made in 1887 was in substitution for and superseded the original agreements, and B. had no right to claim any royalty under the latter.

Crerar, Q.C., for the appellants.

F. C. Moffatt and *Masten*, for the respondent.

QUEBEC.]

DOMINION SALVAGE AND WRECKING CO. v. ATTORNEY-GENERAL FOR CANADA.

Public company—Act of incorporation—Forfeiture of—44 V. c. 6 (D.)—Attorney-General for Canada—Information—R. S. C. c. 21, s. 4—Scire facias—Form of proceedings—Arts. 997 et seq., C. C. P.—Subscription to capital stock—Condition precedent.

The appellant company by its Act of incorporation, 44 V. c. 61 (D.), was authorized to carry on business provided $100,000 of its capital stock were subscribed for and thirty per cent. paid thereon within six months after the passing of the Act, and the Attorney-General for Canada, having been informed that only $60,500 had been *bonâ fide* subscribed prior to the commencing of the operations of the company, the balance having been subscribed for by one G. in trust, who subsequently surrendered a portion of it to the company, and that the thirty per cent. had not been truly and in fact paid thereon, sought, at the instance of a relator, by proceedings in the Superior Court for Lower Canada, to have the company's charter set aside and declared forfeited.

Held, affirming the judgment of the Court below:—

1. That this being a Dominion statutory charter, proceedings to set it aside were properly taken by the Attorney-General for Canada.

2. That such proceedings taken by the Attorney-General for Canada under Arts. 997 *et seq.*, if in the form authorized by those articles, are sufficient and valid, though erroneously designated in the pleadings as a *scire facias*.

3. That the *bona fide* subscription of $100,000 within six months from the date of the passing of the Act of incorporation and the payment of the thirty per cent. thereon were conditions precedent to the legal organization of the company, with power to carry on business, and as these conditions had not been *bona fide* and in fact complied with within such six months, the Attorney-General for Canada was entitled to have the company's charter declared forfeited; GWYNNE, J., dissenting.

Robinson, Q.C., *D. Macmaster*, Q.C., and *Goldstein*, for the appellants.

S. H. Blake, Q.C., and *Lajoie*, for the respondent.

RODIER v. LAPIERRE.

Appeal—Monthly allowance of $200—Amount in controversy—Future rights—Annual rent—R. S. C. c. 139, s. 29 (b)—Jurisdiction.

B. R., under a will and an Act of the Legislature of the Province of Quebec, 54 V. c. 96, claimed from A. L., as administratrix of the estate of the Hon. C. S. Rodier, the sum of $200, being for an instalment of the monthly allowance which A. L. was authorized to pay to each of the testator's children out of the revenues of his estate. The action was dismissed by the Court of Queen's Bench for Lower Canada, and on an appeal to the Supreme Court:—

Held, that the amount in controversy being only $200, and there being no "such future rights" as where the rights in future of B. R. might be bound, within the meaning of those words in s. 29 (b) of the Supreme and Exchequer Courts Act, the case was not appealable.

Annual rents in s-s. (b) of s. 29 of R. S. C. c. 139 mean "ground rents," *rentes foncieres*, and not an annuity or any other like charges or obligations.

The appeal was quashed with costs.

Lash, Q.C., and *DeMartigny*, for the appellant.

Geoffrion, Q.C., and *Beaudin*, Q.C., for the respondent.

DUBOIS v. CORPORATION DE STE. ROSE.

Appeal—Road repair—Municipal by-law—Validity of—Future rights—R. S. C. c. 139, s. 29 (b).

In an action brought by the respondents for the recovery of the sum of $262.14, paid out by them for macadam work on a piece of road fronting on the appellants' lands, the work of macadamizing the road and keeping it in repair being imposed by a by-law of the municipal council of the respondents, the appellants pleaded the nullity of the by-law. On appeal to the Supreme Court of Canada from the judgment of the Court of Queen's Bench for Lower Canada (appeal aside) dismissing the appellants' plea:—

Held, that the appellants' rights in future as to the obligation to repair the road not being "future rights" within the meaning of R. S. C. c. 139, s. 29 (b), the case was not appealable.

County of Vercheres v. *Village of Varennes*, 19 S. C. R. 365, followed; and *Reburn* v. *Ste. Anne*, 15 S. C. R. 92, overruled.

GWYNNE, J., dissented.

The appeal was quashed with costs.

Bastien and *Fortin*, for the appellants.

Ouimet, Q.C., and *Emard*, for the respondents.

NOVA SCOTIA.]

CUNNINGHAM v. COLLINS.

Mortgage—Foreclosure suit—Parties—Lessee of mortgagor—Protection of rights of.

In an action for foreclosure and realization of mortgages, the original defendants were the administrator, heirs at law, and certain devisees of the mortgagor; subsequent incumbrancers, namely, judgment creditors of some of the heirs, and the lessee of a part of the mortgaged property by lease from some of the heirs, not being joined. None of the defendants appeared, and an order was made foreclosing the equity of redemption and directing the lands to be sold unless the amount due on the mortgage was paid before the day fixed for the sale. The sale was to be advertized in a newspaper and by handbills, copies of

the handbills to be mailed to each of the subsequent incumbrancers. By a subsequent order the property was to be sold in two separate lots, the Queen Hotel property, which was that under lease, to be sold first. By a further subsequent order made on the day fixed for the sale, on application of Mrs. S., the lessee of the Queen Hotel, it was ordered that, upon payment into Court by S. and K. of $37,019, further proceedings by the plaintiffs should be stayed until further order, and the plaintiffs should assign to S. and K. the mortgages and lands free from incumbrance and also the suit and all the benefit of the proceedings therein, the plaintiffs to be paid their claim out of money so paid into Court. This order was complied with.

On 26th December, 1889, the defendants moved to rescind the last-mentioned order. The motion was refused and the order amended by a direction that Mrs. S., the lessee of the Queen Hotel, should be made a defendant to the action and that S. and K. should be joined as plaintiffs and the stay of proceedings removed. The lessee, Mrs. S., then filed a statement of defence setting out a lease of the hotel property from three of the mortgagor's heirs to her for five years, subject to renewal for a further term of five years, and that she had entered into possession and made large repairs and improvements.

On 4th January, 1890, another order was made amending the order of sale by directing that the Queen Hotel property be sold subject to the rights of Mrs. S. under the lease and subject to said lease.

From these orders of 26th December, 1889, and 4th January, 1890, the defendants appealed to the Supreme Court of Nova Scotia sitting in banc, which Court affirmed the former order but set aside the latter. Both parties appealed to the Supreme Court of Canada.

Held, affirming the decision of the Court below, that the order of 26th December, 1889, was a proper order. It stayed the proceedings at the instance of a person having a substantial interest in the equity of redemption of part of the mortgaged lands, and if the proposed sale had been under a writ of *fi. fa.*, an injunction might have been granted to restrain it; and it only stayed them on payment into Court of the redemption money. As to the direction in the order for assignment of the mortgages and property by the plaintiffs, the defendants had

no *locus standi* to object, and as to the addition of parties defendants could not be prejudiced thereby. The order also removed the stay of proceedings, but the present appellants could not take exception to that part of it, and the rights of subsequent incumbrancers, who were not before the Court, could not be prejudiced by what was done in their absence.

Held, further, reversing the decision of the Court below, that the order of the 4th January, 1890, was a proper order. Whatever rights the lessee had acquired under the lease she had acquired as a purchaser for valuable consideration of the equity of redemption *pro tanto*, and the Court should endeavour to preserve those rights.

The appeal was dismissed as to the order of 26th December, 1889, and allowed as to the order of 4th January, 1890.

Ross, Q.C., for the appellant.

W. B. Ritchie, for the respondent.

SIDNEY AND LOUISBURG R. W. CO. v. SWORD.

Dower—Defective title—Grant by Provincial Government of Dominion lands—Estoppel—Provincial statute.

S. brought an action to recover dower out of lands conveyed by her husband to the defendant company through another company. The defendants pleaded that the lands were part of the navigable waters of Sidney harbour and were granted to the plaintiff's husband by the Government of Nova Scotia contrary to the provisions of the B. N. A. Act, which vested such property in the Dominion Government. The plaintiff replied that the defendants, having obtained title through her husband, were estopped from denying that his title was valid. The defendants also relied on an Act of the Legislature of Nova Scotia passed in 1884, which enacted that the purchase and conveyance to the defendant company from their immediate grantors were absolutely ratified and confirmed, reserving to any person or persons the right to compensation only for any interest in or lien on the same.

Held, affirming the decision of the Supreme Court of Nova Scotia, STRONG and GWYNNE, JJ., dissenting, that the defendant company was estopped from saying that no title passed to the plaintiff's husband by the grant from the Government of Nova Scotia or from questioning his title thereunder.

Held, further, that the Act of 1884 did not affect the plaintiff's claim. The statute was not pleaded, but if it was not necessary to plead it it could not operate to vest in the defendants property belonging to the Dominion Government, which the property in question did.

Held, *per* PATTERSON, J., that though a paramount title might have been set up against both parties it could not be asserted by the defendants.

Held, also, by the majority of the Court, that the grant to the plaintiff's husband was in fee simple and he had such seisin that dower would attach.

W. B. Ritchie, for the appellants.

Draydale, for the respondents.

NEW BRUNSWICK.]

NORTH BRITISH AND MERCANTILE INSURANCE CO. v. McLELLAN.

Fire insurance—Insurable interest—Property in goods—Construction of contract — Statement in application — Warranty or representation—Breach of condition—Evidence.

By a contract in writing M. agreed to cut and store a certain quantity and description of ice, the ice houses and all implements to be the property of P., who, after the completion of the contract, was to convey the same to M.; the ice was to be delivered by M. on board vessels to be sent by P. during certain months; P. was to be liable to accept and pay for only good merchantable ice delivered and stowed as agreed. The property on which the buildings for storing the ice were situate was leased to P. by the owner, the lease containing a covenant by the owner to grant a renewal to M. A bill of sale was made by M. to a third party of the buildings on the land. M. effected an insurance on the whole stock of ice stored, and in his application, to the question,

"Does the property to be insured belong exclusively to the applicant, or is it held in trust, or on commission, or as mortgagee?" he answered, "Yes; to applicant." The application contained a declaration that the same was a just, full, and true exposition of all the facts and circumstances in regard to the condition of the property so far as known to the applicant and so far as material to the risk, and it was to form the basis of the liability of the company.

The property insured was destroyed by fire, and payment of the insurance was refused, on the ground that the property belonged to P., and not to M. In an action on the policy the defendants endeavoured to prove that other insurance on the same property had been effected by P.; and set up a condition in the policy that in such case the company should only be liable to pay its ratable proportion of the loss. This condition was not pleaded, and the policies to P. were not produced, nor the terms of his insurance proved. Evidence was given, subject to objection as to its admissibility, that P. had effected the insurance to cover advances made to M. on the ice, and had been paid his loss. The plaintiff obtained a verdict for the full amount of his policy, which was affirmed by the Supreme Court of New Brunswick.

Held, affirming the decision of the Court below, that the whole property in the ice insured was in M. That the clause in the agreement stating that the ice-houses and implements were to be the property of P. meant that the buildings and implements only were to pass to P., as he was to convey the property vested in him by the agreement to M. on completion of the contract, and could not so convey the ice which M. was to deliver on board vessels, which he could not do unless it was his property.

Held, further, that the declaration in the application did not make M. pledge himself to the truth of the statements therein absolutely, but only so far as known to him and as material to the risk, and questions of materiality and knowledge were for the jury, who found them in favour of M.

Held, also; STRONG, J., dissenting; that the declaration was not a warranty of the truth of the statements, but a mere collateral representation.

Per STRONG, J.—It was a warranty, but as it was confined to matters within the knowledge of M. and material to the risk, the result was practically the same.

Held, as to the further insurance, that the condition should have been pleaded, but if available without plea it was not proved; what evidence was given should not have been received.

Per STRONG, J.—It was not shown that P.'s insurance was on the ice insured by M., who was not bound to deliver any specific ice under the contract.

Per GWYNNE, J.—The damages should be reduced by the amount received by P.

Weldon, Q.C., and *Jack*, for the appellants.

F. E. Barker, for the respondent.

BRITISH COLUMBIA.]

CAMERON v. HARPER.

Executor—Action against—Legacy—Trust—Claim on assets—Charge on realty.

T. H. and his brother were partners in business, and the latter having died, T. H. became by will his executor and residuary legatee. A legacy was left by the will to E. H., part of which was paid and judgment recovered against the executor for the balance. T. H. having incumbered both his own share of the property and that devised to him, one of his creditors and a mortgagee of the property obtained judgment against him and procured the appointment of receivers of his estate. E. H. then brought an action to have it declared that his judgment for the balance of his legacy was a charge upon the moneys in the receivers' hands in priority to the personal creditors of T. H.

Held, affirming the judgment of the Court below, that it having been established that the moneys held by the receivers were assets of the testator, or the proceeds thereof, E. H. was entitled to priority of payment, though his judgment was registered after those of the other creditors.

Held, also, that the legacy of E. H. was a charge upon the realty of the testator, the residuary devise being of "the balance and remainder of the property and of any estate" of the testator, and the words "property" and "estate" being sufficient to pass realty. This charge upon realty operated against the mortgagees, who were shown to have had notice of the will.

Robinson, Q.C., for the appellants.

S. H. Blake, Q.C., for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

2ND D. C. SIMCOE.] [OSLER, J.A., 15TH JULY, 1892.

KINNEAR v. ASPDEN.

Apportionment—Landlord and tenant—Rent—Mortgagor and mortgagee—Eviction—R. S. O. c. 143, s. 2 et seq.

Where demised property is sold by a prior mortgagee under power of sale, and the lease is thus determined between two gale days, the rent is apportionable, and the tenant is liable to pay rent up to the day of such determination.

Judgment of the Junior Judge of Simcoe affirmed.

E. D. Armour, Q.C., for the appellant.

Aylesworth, Q.C., and *F. J. Travers*, for the respondent.

High Court of Justice.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 28TH JUNE, 1892.

REDICK v. TRADERS BANK.

Prohibition—County Court—Jurisdiction—Action to recover alleged surplus after mortgage sale.

The defendants sold lands under a power of sale in a mortgage whereon over $6,200 was due, and retained the whole proceeds of sale. The assignee of the mortgagor brought this action claiming payment of an alleged surplus in the hands of the defendants, which they disputed.

Held, that the County Court had jurisdiction to entertain the action.

C. J. Holman, for the plaintiff.

A. H. F. Lefroy, for the defendants.

RANDALL v. DOPP.

Family settlement—Execution by all members of the family—Valuable consideration—Interest—Attack by execution creditor of one of the settlors.

One of the defendants, having entered into the business of a hotel-keeper, joined with his brother and sisters in a settlement of all their interests in their father's estate for the benefit of their mother. In an action by a subsequent judgment creditor to set aside the settlement:—

Held, affirming the judgment of ARMOUR, C.J., that on the evidence there was no fraudulent intent; that the agreement to execute and the execution by the other members of the family was a valuable consideration for the settlement; and it could not be impeached.

John Rowe, for the plaintiffs.

E. P. Clement, for the defendant Adeline Dopp.

ORR v. DAVIE.

Mechanic's lien—53 V. c. 37—Jurisdiction of Master—Procedure.

In a proceeding in the Master's office, under 53 V. c. 37, in which the Master-in-Ordinary decided that his jurisdiction was a limited statutory one, and that because the statement of claim did not show the time the work was done, and the certificate issued under s. 3 was not served as prescribed by s. 6, he had no power to amend or proceed further; and set aside the lien:—

Held, reversing the decision of the Master-in-Ordinary, that he should have entertained the application to extend the time for prosecuting the reference; and that all the ordinary rules of procedure in the conduct of contested litigation are to be read into the Act, which was intended to simplify but not to introduce new rules of practice.

C. J. Holman, for the appeal.

Macklem, contra.

[FERGUSON, J., 18TH JUNE, 1892.

REGGIN v. MANES.

Mechanic's lien—R. S. O. c. 126, s. 2, s-s. 3; s. 9—"Owner"—Computation of the ten per cent.

Certain builders, on 3rd February, 1891, agreed with H. to construct a house for him on land then owned by them, and proceeded with the work accordingly for him, though no conveyance of the land was made to H. till 23rd May, 1891.

Held, that, even though the agreement of 13th February, 1891, might not have been good in the face of a pleading setting up the Statute of Frauds, yet H. was the "owner" within the meaning of R. S. O. c. 126, s. 2, s-s. 3, from that date.

The builders failed to complete the house, and H., who had already paid the contract price, had to expend $438 to finish the building.

Held, that, in computing the ten per cent. under R. S. O. c. 126, s. 9, this sum of $438 must be deducted from the contract price of the building.

George Kerr, for the owner.

Moss, Q.C., for a sub-contractor.

Hoyles, Q.C., for other lien-holders.

[9TH JULY, 1892.

BALDWIN v. WANZER.

BALDWIN v. CANADIAN PACIFIC R. W. CO.

Landlord and tenant—Right of re-entry on condition broken—Severance of reversion—Imperial Conveyancing Act, 1881, s. 12.

Action for recovery of possession of land upon an alleged right of re-entry after breach by the tenant of a covenant not to assign or sublet without lease.

Held, that there having been a severance of the reversion, it followed as a consequence that the right of re-entry for condition broken was destroyed.

Dumpor's Case, Sm. L. C., 8th ed., pp. 49, 50, followed.

There is no enactment in force in this country corresponding with s. 12 of the Imperial Conveyancing and Law of Property Act, 1881, which provides that: "Notwithstanding the severance by conveyance . . of the reversionary estate in any lands comprised in a lease and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry and every other condition contained in the lease shall be apportioned, and shall remain annexed to the several parts of the reversionary estate as severed, etc." The law here on the subject is the same as it was in England immediately before the passing of this enactment.

Moss, Q.C., and *R. B. Henderson*, for the plaintiffs.

Robinson, Q.C., *J. K. Kerr*, Q.C., *E. D. Armour*, Q.C., *William Macdonald*, and *W. C. McKay*, for the defendants.

[26TH SEPTEMBER, 1892.

In re HELPS ESTATE.

Trustee under will—Security.

A new trustee appointed by the Court in the stead of one appointed by will is not required to give security for the due performance of the trusts, etc.

Garrow, Q.C., for the petitioner.

J. Hoskin, Q.C., and *E. L. Dickinson*, for the respondents.

IN CHAMBERS.

[BOYD, C., 29TH JUNE, 1892.

SPARKS v. PURDY.

Costs—Taxation—Allowing service of writ of summons out of the jurisdiction—Rule 274—Form 121—Mortgage action—Tenant in possession—Personal service on infant heirs of mortgagor—Rules 258, 259—Copies of writ of summons—Copies of pleadings for brief—Rule 395.

Upon an appeal from the taxation of the plaintiff's costs of a mortgage action:—

Held, that where the plaintiff, before serving the writ of summons on defendants out of the jurisdiction, obtains an order shortening the time for appearance, he should include in it an order allowing the issue of the writ for service out of the jurisdiction, and should not have taxed to him the costs of a subsequent order allowing the service.

Rule 274 and Form 121 considered.

2. In a mortgage action where possession is claimed, the writ of summons need not be served personally on the infant heirs of the mortgagor, if they are not personally in possession.

Rules 258 and 259 considered.

3. A writ of summons is a "pleading or other document" within the meaning of Rule 395, and more than four copies cannot be

4. The provision of Rule 395 as to four copies covers all copies required during litigation and extends to the copy of pleadings in the brief.

Middleton, for the plaintiff.

F. W. Harcourt, for the infant defendants.

[26TH SEPTEMBER, 1892.

In re EDDIE.

Devolution of Estates Act—Sale of infants' lands charged with legacy.

Alexander Eddie devised lands to a daughter, who predeceased him, leaving her surviving two infant children. These lands were charged with payment of a pecuniary legacy. The executors proposed to sell the lands in order to pay the legacy. The official guardian refused to give his consent to the proposed sale under the Devolution of Estates Act unless directed by the Court.

Middleton, for the executors, applied to BOYD, C., in Chambers, for a direction.

J. Hoskin, Q.C., appeared as official guardian.

BOYD, C., held that the executors ought to sell the lands, and gave a direction accordingly.

[27TH SEPTEMBER, 1892.

MORSE v. LAMBE.

Mortgage action—Default of appearance—Noting pleadings closed—Rule 393.

By analogy to Rule 393, where, in a mortgage action for foreclosure or sale, some of the defendants do not appear to the writ of summons and others do appear, the officer may note the pleadings closed as against those who do not appear.

C. W. Kerr, for the plaintiffs.

[28TH SEPTEMBER, 1892.

CHARLEBOIS v. GREAT NORTH-WESTERN R. W. CO.

Judgment debtor—Company—Examination of officer—Rule 927—Scope of inquiry.

The object of the examination under Rule 927 of an officer of a body corporate, after judgment against it, is to discover assets of the company or to follow assets wrongfully disposed of, and within this limit a judgment creditor is entitled to full disclosure of the company's concerns, and as a consequence to have access to its books pertinent to that line of inquiry. The person examined is to facilitate the examination by procuring all information in the possession of the company which he himself has not as an officer of the company.

There is no right to examine as to dealings with stock which were had after it was fully paid up.

H. S. Osler, for the plaintiff.

McMichael, Q.C., for the defendants.

[FALCONBRIDGE, J., 2ND AUGUST, 1892.

DALEY v. BYRNE.

Pleading — Striking out—Summary application — Demurrer—Seduction—Defence.

A pleading will not be summarily struck out on the ground that it is demurrable.

Glass v. *Grant*, 12 P. R. 481, followed.

Where the statement of defence in an action of seduction alleged that the cause of action was in another than the plaintiff, but did not allege that that other sought to proceed by action :—

Held, that, as there was no authority expressly holding this defence to be bad, it should not be struck out; but leave was given to reply and demur.

Watson, Q.C., for the plaintiff.

F. A. Anglin, for the defendant.

[MEREDITH, J., 21ST SEPTEMBER, 1892.

[BOYD, C., 26TH SEPTEMBER, 1892.

SMITH v. HOUSTON.

Service of warrant—Dispensing with—Rules 3, 467.

Upon an application in Chambers for an order dispensing with service of a warrant and all subsequent proceedings in the Master's office upon certain absent defendants, other defendants in the same interest being represented :—

Held, by MEREDITH, J., that Rule 467 did not apply to the case, and the order should not be made.

Leave being given to renew the application :—

Held, by BOYD, C., that, in accordance with Rule 3, the practice should be regulated by analogy to Rule 467, and the order should be made.

D. Armour, for the plaintiff.

F. W. Harcourt, for the official guardian.

NOVA SCOTIA.

In The Supreme Court.

McCURDY v. McRAE.

Chose in action—Assignment of—Action by assignee in name of assignor.

Held, per TOWNSHEND and RITCHIE, JJ., that the assignee of a chose in action can sue therefor in the assignor's name notwithstanding an absolute assignment; and to a defence that the cause of action was assigned, it is sufficient to reply that the action is brought with the consent of the assignee, and for his benefit, and no objection can be upheld that the plaintiff did not sue in a representative capacity.

McDONALD, C.J., and WEATHERBE, J., contra.

CAMERON v. GRANT.

Statute of Limitations—Acknowledgment—Sufficiency of.

In letters relied on to take a claim for a debt out of the Statute of Limitations, the defendants' testator, after detailing his unfortunate position, etc., wrote: "I have now my debt nearly paid," referring to another liability, "and the amount of your claim secure in property, viz., land property * * * so that you will be as sure of your money in a short time as if you had it. Rest assured that I have your money secured in a manner that you will get, although I cannot send it now. * * * Rest assured that I have your money secured so that you will get it, whatever becomes of me."

Held, per McDONALD, C.J., and RITCHIE, J., the latter *dubitante*, GRAHAM, E.J., dissenting, that the letter was a sufficient acknowledgment.

CARROLL v. CURLESS.

Contract—Evidence of—Notice of action.

Claim of an informant for money received by the defendant, an officer of Inland Revenue and Customs, sustained, the evidence being clear that the services of the plaintiff were performed at the defendant's request, and that there was a personal agreement by the defendant with the plaintiff to pay him the money.

TOWNSHEND, J., dissenting, held that the finding of the County Court Judge as to the agreement was not conclusive, the evidence having been taken before a commissioner, and that the agreement was not proved.

Objection of want of notice of action overruled.

Carroll v. *Curless*, 21 N. S. Reps. 282, and *McDonald* v. *Clarke*, 22 N. S. Reps. 10, considered.

SAMPSON v. SAMPSON.

Right of way—No costs on appeal where the whole judgment was appealed from and appellant succeeded as to part only.

The plaintiff claimed damages for obstruction of the right of way for foot passengers, carts, etc. The defendant denied the right of way; and the right to a foot path, but not for carts, etc., was proved.

Held, reversing the judgment of the trial Judge, that under the issue as to the foot path, the plaintiff was entitled to recover, no damages having been tendered, but that the appeal should be allowed without costs, as the plaintiff had appealed from the whole judgment and had shown no right of way for carts.

NEWFOUNDLAND.

In the Supreme Court.

[7TH JANUARY, 1892.

GILLARD v. JOB.

Customs—Evidence of—Insolvency—Sale of fish—Set-off.

In July, 1891, Fox & Sons, of St. Johns, sold to the defendants the cargo of fish comprised in the second trip of their banking schooner "Aerolite." It was agreed that the fish upon arrival was to go into the hands of fishmakers from whom, upon the completion of its cure, the defendants were to take it. The fish was delivered from time to time in lots to the defendants, but it was not wholly taken until after an assignment made in September, 1891, whereby the estate and effects of Fox & Sons were assigned to the plaintiff as trustee for the benefit of creditors, under deed of arrangement for a composition. Insolvency proceedings were subsequently taken. In the meanwhile, and prior to the assignment, other dealings took place between the parties under which Fox & Sons were largely indebted to the defendants. The claim of the plaintiff was for $2,496.70, the value of the fish. The defendants claimed to have their account of $1,746.84 set off against the claim of the plaintiff, and paid the balance, $750.86, into Court. The contention of the plaintiff was that his claim, being for a sale of fish, was by a custom of the country payable in cash, whereas the contra account was by custom only payable at the close of the year upon a settlement of accounts. Accordingly he contended that the defendents were not entitled to a set-off, but must pay the full cost of the fish and look to the insolvent estate for the payment of their contra account, *pro rata* with the other creditors.

Held, that the property in the cargo of the "Aerolite" passed to the defendants prior to the assignment to the plaintiff; that the plaintiff failed to prove the alleged customs; and that therefore the defendants were entitled to set off the amount actually due themselves.

The charge of $78, made in the defendants' account for dockage due the dock company, for which they were agents, was disallowed, and the plaintiff permitted to enter up judgment for that amount with costs as upon an action for the recovery of that sum.

Greene, Q.C., for the plaintiff.

Winter, Q.C., for the defendants.

REGINA v. O'NEIL.

Liquor License Act, 1875, s. 19—Construction of—Summary conviction—Appeal.

Thomas O'Neil was a licensed publican in St. Johns. On the 21st August, 1891, the public entrance to his saloon was open at 5.30 a.m. Of this he was convicted before a magistrate and fined $20. The offence was against the 19th section of the Liquor License Act of 1875, the penalty being imposed under the 26th section. Against this conviction he appealed, on the ground that to constitute an offence under the 19th section the whole of the particulars therein mentioned must combine, that is to say, that it was necessary to prove that between 10 p.m. and 6 a.m. (1) the premises in question were not closed; (2) business was being done there; and (3) intoxicating liquors were delivered or consumed.

Held, following the analogy of the Imperial Act 38 V. c. 49, and according to the construction it received in *Brigden* v. *Heighes*, 1 Q. B. D. 330, and *Tassell* v. *Overden*, 2 Q. B. D. 383, that any of the three acts specified in the 19th section must be regarded as a separate offence, the intention of the Legislature being as plainly declared as if the Act had said a licensed publican shall keep his premises absolutely closed, he shall not transact any business, nor shall he vend any intoxicating liquors, between the hours mentioned.

Under the special circumstances of the case it was recommended that the penalty be reduced.

Kent, Q.C., for the appeal.

Lilly, contra.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

CH. D.] [21ST OCTOBER, 1892.

STEVENSON v. DAVIS.

Vendor and purchaser—Possession—Interest.

This was an appeal by the plaintiffs from the judgment of the Chancery Division, 21 O. R. 642, and was argued on the 20th and 21st of October, 1892.

Hoyles, Q.C., and *C. W. Colter*, for the appellants.

Furlong, for the respondent.

At the conclusion of the argument the appeal was dismissed with costs, the Court seeing no ground for interfering with the judgment appealed from.

C. P. D.] [10TH OCTOBER, 1892.

GOODERHAM v. CITY OF TORONTO.

Way—Public highway—Plan—Dedication—User—R. S. O. c. 152, s. 62—Municipal corporations—By-law.

Section 62 of R. S. O. c. 152, which provides that all allowances for streets surveyed in cities or in any part thereof which have been or may be surveyed and laid out and laid down on the plans thereof and upon which lots of land fronting on such allowances for streets have been or may be sold to purchasers

shall be public highways and streets and commons, is retroactive and applies to streets laid out on plans made and registered before the passing of the Act.

A piece of land in the city of Toronto of about twenty acres in extent was in 1854 surveyed and laid out in lots and streets and a plan was duly registered. Certain lots were sold and were conveyed according to the plan, but were afterwards re-purchased by the original owners of the piece of land, predecessors in title of the plaintiffs, and the whole piece was then fenced in and used as a field until 1888, when the city corporation, without passing any by-law, proceeded to open the streets :—

Held, that the streets shown on the plan were highways which the corporation were entitled to open, but that a by-law was necessary.

Judgment of the Common Pleas Division, 21 O. R. 120, affirming, by a division of opinion, that of FERGUSON, J., affirmed.

Ross, Q.C., and *R. McKay*, for the appellants.

Robinson, Q.C., for the respondents.

ARMOUR, C.J.]

MORRISON v. WATTS.

Trusts and trustees—Fiduciary relationship—Purchase of trust property—Assignments and Preferences Act, R. S. O. c. 124—Inspectors.

A purchase by the assignee for the benefit of creditors of the assets of the estate made by him at the request of the inspectors of the estate, after futile efforts to sell at auction and by private tender, and after a circular letter was sent by the inspectors to each creditor stating that the sale would be made unless objection was taken, was set aside, there being evidence that at the time of the purchase the trustee knew of and was negotiating with a possible purchaser, to whom he afterwards resold at a large profit, and did not disclose this information to the inspectors.

Though the Assignments and Preferences Act, R. S. O. c. 124, does not clearly define the powers or duties of the inspectors of an insolvent estate, it would appear that they have no power, unless specially authorized by the creditors, to bind the creditors by anything they do in disposing of the estate, the disposal of which is in the hands of the creditors, and in default of directions by them in the hands of the Judge of the County Court.

Judgment of ARMOUR, C.J., affirmed; BURTON, J.A., dissenting.

S. H. Blake, Q.C., and *A. Watts*, for the appellant.

Brewster, for the respondent.

ROBERTSON, J.] [18TH MAY, 1890.

McMILLAN v. BARTON.

Principal and agent—Trusts and trustees—Fraud—Statute of Frauds.

Property of the plaintiff's husband having been offered for sale under mortgage, she agreed orally with the mortgagee's solicitors to purchase it, but, not having the means to make the cash payment required, she saw one of the defendants, who agreed to lend her for a year the necessary money and to take a deed of the property as security and he gave to the solicitors a written offer to make the purchase on the terms arranged by the plaintiff, which offer was by the solicitors orally accepted. The property was, however, in fact, conveyed to the other defendant, who was the daughter of her co-defendant.

Held, per HAGARTY, C.J.O., and MACLENNAN, J.A., that on the evidence the conveyance to the daughter was the result of a fraudulent conspiracy between her father and herself to deprive the plaintiff of her bargain; that therefore the daughter stood in no better position than the father; and that he was an agent for the plaintiff whose agency might be proved by oral evidence notwithstanding the Statute of Frauds.

Held, per BURTON and OSLER, JJ.A., that on the evidence the purchase by the daughter was not a collusive one, but was one for her own benefit, and that it could not be impeached.

The Court being equally divided, the judgment of ROBERTSON, J., at the trial was affirmed.

Upon appeal to the Supreme Court of Canada, 20 S. C. R. 404 the view of HAGARTY, C.J.O., and MACLENNAN, J.A., was adopted.

Moss, Q.C., and *C. Millar*, for the appellants.

Bain, Q.C., for the respondent.

STREET, J.] [10TH MAY, 1892.

DWYER v. TOWN OF PORT ARTHUR.

Municipal corporations—By-law—Validating statute—Street railways—Costs.

In January, 1891, the defendants passed a by-law to raise $75,000 for street railway purposes, with a recital that it was necessary to raise that sum for the purpose of building a street railway connecting the municipality of Neebing with the municipality of Port Arthur. The by-law had been submitted to the electors and had been carried by their votes, but the approval of the Lieutenant-Governor in Council had not been obtained, and the provisions of s. 505 of the Municipal Act had not been observed. This action was brought to restrain the municipality from constructing the street railway under this by-law, and on the 4th of May, 1891, while the action was pending, an Act, 54 V. c. 78 (O.), was passed declaring that the by-law in question was legal and valid to all intents. After the passing of the Act an injunction was granted by STREET, J., restraining the defendants from acting under the by-law, on the ground that the Act in question did not go far enough. The action was afterwards brought down to trial, and MACMAHON, J., following the judgment of STREET, J., made the injunction perpetual.

Held, reversing these judgments, that the validating Act had the effect of changing the by-law from one for raising money merely to one for construction, and made it valid for all purposes.

Held, also, that the plaintiffs were entitled to the costs of the action down to the time of the passing of the Act, and in addition the costs of a motion in Chambers for the disposal of the action, and that the defendants were entitled to the subsequent costs and to the costs of the appeal.

Observations on the course that should be followed by the Legislature in passing Acts to validate proceedings which are under attack in a pending action.

Delamere, Q.C., for the appellants.

Aylesworth, Q.C., and *D. W. Saunders*, for the respondents.

C. C. YORK.] [13TH SEPTEMBER, 1892.

HODGINS v. CITY OF TORONTO.

Trees—Highways—Telephone—Tree Planting Act, R. S. O. c. 201—Municipal Act, R. S. O. c. 184, s. 479 (20).

The plaintiff was the owner of lands in the city of Toronto on a street which was an original road allowance. The defendants the Bell Telephone Company, with the assent but without any express resolution or by-law of the city, or any notice or compensation to the plaintiff, cut off branches overhanging the street from trees growing within the plaintiff's grounds, and also branches of trees growing in the street in front of the plaintiff's grounds, alleging that the branches interfered with the use of the wires of a telephone system which they had contracted with the city to maintain. Section 8 of the Tree Planting Act, R. S. O. c. 201, had not been brought into force in Toronto.

Held, *per* OSLER and MACLENNAN, JJ.A.; HAGARTY, C.J.O., dissenting; that s. 479 (20) of the Municipal Act, R. S. O. c. 184, applies only when s. 8 of the Tree Planting Act, R. S. O. c. 201, is in force, and that the plaintiff had no interest in or title to the trees growing in the street sufficient to enable him to complain of the cutting.

But *held*, also, *per* HAGARTY, C.J.O., and OSLER, J.A.; MACLENNAN, J.A., dissenting; that as the overhanging branches of the trees growing within the plaintiff's grounds were not a nuisance and in no way interfered with the use of the highway, the defendants had no right to cut them.

In the result, therefore, the judgment of the Junior Judge of the County of York was in part affirmed, the damages being reduced by $10.

H. M. Mowat, for the appellants the City of Toronto.

S. G. Wood, for the appellants the Bell Telephone Co.

F. E. Hodgins, for the respondent, the plaintiff.

C. C. PEEL.] [3RD OCTOBER, 1892.

In re HAGGERT BROS. MANUFACTURING CO.

Company — Shares — Subscription — Charter—Allotment—Calls—Statute of Limitations.

Persons named in the charter of a company as shareholders are liable as such for calls which may be afterwards made upon the stock stated in the charter to be held by them, and no further act of the directors in allotting such stock or giving them notice of allotment is necessary.

After the issue of letters patent in 1880 incorporating a company and naming certain persons as shareholders, these persons stated to certain of the directors of the company that they would not accept their stock and would have nothing more to do with the company, but no proceedings were taken by them to relieve themselves from liability; and no proceedings were taken against them until the company was wound up in 1891.

Held, distinguishing *Nichol's Case*, 29 Ch. D. 421, that as these persons had not a mere inchoate right to receive shares, but were actually shareholders and members of the company by virtue of the charter, mere statements of this kind and the lapse of time and the failure of the directors to enforce payment of the shares did not relieve these shareholders.

There is no liability to pay for shares until a call is made and notice thereof given to the shareholder, and until that time the Statute of Limitations does not begin to run against the company. Where, therefore, persons were named in the charter issued in 1880 as shareholders, they were in 1891 held liable to pay the amount of their shares, no formal call having in the meantime been made.

Judgment of the County Court of Peel affirmed.

Shepley, Q.C., for the appellants.

Moss, Q.C., for the respondent.

C. C. LENNOX AND ADDINGTON.]

JOHNSON v. MARTIN.

Bills of exchange and promissory notes—Patent of invention—Fraud—Illegality.

The action was brought to recover the amount of certain promissory notes given by the defendant in April, 1888, on the purchase by him of patent rights in a washing machine. The notes were not marked with the words "given for a patent right," as required by R. S. C. c. 123, s. 12, and were taken by the plaintiff from the original holder with knowledge, as the jury found, of the nature of the consideration.

Held, not only that the plaintiff was in the same position as if the notes had been ear-marked with these words so as to enable the defendant to set up as against him any defences that would have been available against the original holder, but also that the original holder having committed a misdemeanour in accepting the notes without these words and a further misdemeanour, in which the plaintiff participated, in the transferring them to the plaintiff without these words, the plaintiff could not in any event recover.

Judgment of the County Court of Lennox and Addington reversed.

C. J. Holman, for the appellant.

Aylesworth, Q.C., for the respondent.

High Court of Justice.

COMMON PLEAS DIVISION.

[The Justices in Banc, 27th June, 1892.

REGINA v. RAWSON.

Municipal corporations—Auctioneers—Assignee of bankrupt estate—Selling without license—R. S. O. c. 184, s. 495—Summary conviction—License fee not imposition of tax.

Where an assignee of a bankrupt estate put up and sold by auction the goods thereof, being the only occasion on which he so acted within the county :—

Held, that he came within the terms of a county by-law passed under s. 495 of the Municipal Act, R. S. O. c. 184, prohibiting persons from acting as auctioneers in the county without being duly licensed therefor; and was therefore properly convicted thereunder.

Per Rose, J.—The fixing by the by-law of a sum of $25 to be paid for the license to so sell is within the power given to the municipality to license.

Shepley, Q.C., for the defendants.

Pepler, Q.C., for the magistrate and prosecutor.

REGINA v. BUTLER.

Municipal corporations—By-law passed by police commissioners for licensing omnibuses, etc.—Restriction limited to owners and not to drivers—R. S. O. c. 184, s. 436.

A by-law passed under s. 436 of the Municipal Act, R. S. O. c. 184, by the police commissioners of a city, enacted that no person or persons should drive or own any omnibus, etc., without being licensed so to do.

Held, that this applied only to the owner and not to the driver of such omnibus, etc.

Ryckman, for the defendant.

Langton, Q.C., for the magistrate and prosecutor.

REGINA v. RHODES.

Criminal law—Forgery—Interest of witness—R. S. C. c. 174, s. 2—Construction of.

On the trial of an indictment for uttering a forged note, evidence in proof of the note being forged was given by E., who had no interest therein. Evidence in support of the uttering was given by J. H., the wife of R. H., to whom the note was given while she was in attendance in her husband's shop as his agent.

Per MacMahon, J.—The note having been proved to be a forgery by a person having no interest therein, the question whether the wife's evidence should be corroborated on the ground of interest, would not arise under s. 218 of the Criminal Procedure Act, R. S. C. c. 174.

Per Rose, J.—The wife had no interest in the forged document; her interest, if any, was to prove its genuineness; but in any event, there was abundant corroborative evidence.

Murdoch, for the prisoner.

J. R. Cartwright, Q.C., for the Crown.

REGINA v. FEARMAN.

Liquor License Act—Evidence of license inspector—Interest—R. S. O. c. 61, s. 2—Evidence of defendant—55 V. c. 14—Summary conviction—Indian reserve—R. S. O. c. 5, s. 1.

Upon a prosecution for an offence against the Liquor License Act, R. S. O. c. 194, the evidence of a license inspector, the informant, is admissible, for he has, under the Act, no interest in the penalty; but, apart from this, he is a competent witness by virtue of s. 2 of the Evidence Act, R. S. O. c. 61, which removes all disability by reason of interest. Upon such a prosecution the evidence of the defendant is inadmissible.

Regina v. *Hart*, 20 O. R. 611, and *Regina* v. *Bittle*, 21 O. R. 605, followed.

Held, that 55 V. c. 14, amending R. S. O. c. 61, under which these cases were decided, did not apply to the conviction of the defendant, which was before the passing of the Act.

The defendant was summarily convicted for selling liquor without a license at the village of M., in the township of O. It was objected that, as that township comprised an Indian reserve, within which the Liquor License Act was not in force, the conviction should have negatived the offence having been committed in such reserve.

Held, that by s. 1 of R. S. O. c. 5, there was *prima facie* jurisdiction to convict for an offence committed in the township; and as there was nothing in the evidence to show that the offence was committed in the reserve, the objection was untenable.

Du Vernet, for the defendant.

Langton, Q.C., for the magistrate and prosecutor.

REGINA v. McGOWAN.

Liquor License Act—Unorganized districts—Summary convictions—Justices of the peace—Reeves of municipalities.

The reeve of a municipality in an unorganized district is, under the legislation relating to such districts, *ex officio* a justice of the peace in his own municipality, with power to sit alone for the trial of offences against the Liquor License Act, R. S. O. c. 194.

Hewson, for the defendant.

Langton, Q.C., for the magistrate and prosecutor.

[THE DIVISIONAL COURT.

SMITH v. FRANKLIN.

Landlord and tenant—Assessment and taxes—Distress for taxes made by municipality on goods of tenant—Demand—R. S. O. c. 193, s. 123—Action for damages for distress—Remedy under s. 24—Measure of damages—Irregularities in distress—Liability for—Covenant for quiet enjoyment.

The provision of s. 123 of the Assessment Act, R. S. O. c. 193, requiring a demand for municipal taxes to be made fourteen days prior to distress, is satisfied by a demand made for the first instalment.

The occupant of the premises assessed is not limited to the remedy given him by s. 24 of the Act, viz., to deduct from his rent any taxes paid by him, but may bring an action against his landlord to recover damages sustained by reason of a distress for taxes upon the premises. But such damages are restricted to the amount of the taxes paid to remove such distress, and do not include consequential damages.

In the absence of fraud on the part of the landlord, no liability is imposed on him by reason of irregularities by the municipality in making the distress.

Such distress is not a breach of the covenant for quiet enjoyment in a short form lease, for in distraining the municipality is not claiming from or under the landlord.

R. G. Smyth, for the plaintiff.

Shepley, Q.C., for the defendant.

In re TRIMBLE v. MILLER.

Prohibition— Division Court—Judgment for amount beyond jurisdiction— Prohibition for excess only—Promissory note—What constitutes.

Judgment was recovered in a Division Court for $108.63, being $100 balance due and $8.63 interest, under the following instrument signed by the defendants: "To G. T.—We hereby undertake to pay the executors of the late J. D. K. the sum of $375 on a mortgage they hold against the Royal Hotel property, Streetsville, thereby reducing the mortgage to $2,000.

Held, that the document, even if a promissory under s. 82 of the Bills of Exchange Act, 53 V. c. 33 (D.), which was open to doubt, only enured to the benefit of K.'s executors and not to G. T.; and therefore the action must be deemed to be for a breach of contract, in which the jurisdiction of Division Courts is limited to $100; and therefore the judgment was in excess of the jurisdiction; but that prohibition must be limited to the excess, namely, the $8.63.

Justin and *Blain*, for the defendants.

Aylesworth, Q.C., for the plaintiff.

IN CHAMBERS.

[Boyd, C., 11th October, 1892.

DAVIDSON v. GURD.

Summary judgment—Rule 739—Writ of summons—Special indorsement—Rule 245—Action for indemnity against mortgages—Covenant, express or implied—Equitable obligation—Preliminary contract—Amendment.

The plaintiffs sued the defendants for moneys alleged to have been paid by them for interest upon certain mortgages and for the principal due under certain other mortgages. The writ of summons was specially indorsed and contained a statement that the defendant was liable to pay the motion by virtue of a certain covenant made by him with one T. on a certain date and assigned by T. to the plaintiffs. Upon a motion by the plaintiffs for summary judgment under Rule 739, it appeared that the deed alleged to contain the covenant made by the defendant with T. did not in fact contain any express covenant to pay the mortgages, but by it T. conveyed the lands in question to the defendant "subject to all mortgages registered against the lands," and the deed was not executed by the defendant. The plaintiffs, however, sought to support the indorsement by reference to the preliminary contract between the defendant and T., which contained an offer to assume and to covenant to pay off the mortgages.

Held, that, although the deed expressed an equitable obligation by the defendant to indemnify T., there was no covenant in any sense; and the plaintiffs could not invoke the benefit of the preliminary contract, for the indorsement must be complete in itself, containing everything which entitles the plaintiffs to recover; and the Court will not encourage an amendment for the purpose of upholding a summary judgment.

Fruhauf v. *Grosvenor*, 8 Times L. R. 744, followed.

Held, also, that Rule 245, specifying the different kinds of actions in which writs may be specially indorsed, does not extend to the case of an action upon an implied covenant.

J. A. Paterson, for the plaintiffs.

F. E. Hodgins, for the defendant.

[14TH OCTOBER, 1892.

In re ROBINSON, McDONELL v. ROBINSON.

Will—Legacy—Interest.

A testatrix by her will directed that a legacy should be paid out of the proceeds of the sale of lands, and that the lands should be sold at any time within two years after her death.

Held, that interest upon the legacy should be allowed from the day when the two years expired; or, if the lands were sooner sold, from the date of sale.

Masten, for the plaintiff.

Frank Denton, for the defendant.

[GALT, C.J., 11TH OCTOBER, 1892.

McNAB v. MACDONNELL.

Writ of summons—Indorsement of character of parties—Rule 224—Irregularity—Waiver—Statement of claim—Want of conformity—Striking out—Amendment.

The writ of summons was indorsed only with a claim for damages for negligence and breach of trust on the part of the defendants in the investment of money upon mortgage. There was no indorsement of the character of parties. The defendants appeared and the plaintiff thereupon delivered a statement of claim in which it was set forth that the plaintiff was the administrator of one who was in her lifetime entitled to the moneys invested by the defendants. It was shown that one of the defendants was fully aware of all the facts of the case and of the capacity in which the plaintiff sued.

Upon a motion by the defendants to strike out the statement of claim as embarrassing in that it did not follow the writ:—

Held, that the defendants, by entering an appearance, instead of moving against the writ, had waived the irregularity of the plaintiff in not stating the character of the parties, as required by Rule 224.

Held, also, that as the statement of the claim shewed the character in which the plaintiff was suing, it was not necessary to amend the writ.

E. Taylour English, for the plaintiff.

Langton, Q.C., for the defendants.

[ROSE, J., 10TH SEPTEMBER, 1892.

ERDMAN v. TOWN OF WALKERTON.

Parties—Municipal corporations—Relief over—Municipal Act, 55 V. c. 42, s. 531, s-s. 5—Defendant—Third party.

A third party is "a party to the action" within the meaning of s. 531, s-s. 5, of the Municipal Act, 55 V. c. 42; and where a defendant municipal corporation, under that enactment, seeks to have another corporation or person added as a party for the purpose of enforcing a remedy over, such person or corporation should be made a third party and not a defendant, unless the plaintiff seeks some relief against such added party; and it is improper to add such party both as a defendant and a third party.

W. H. Blake, for the plaintiff.

Aylesworth, Q.C., for the defendants.

J. B. Holden, for the third party.

[MACMAHON, J., 28TH JULY, 1892.

REGINA v. TOLAND.

Constitutional law—Forgery—Summary trial by police magistrates—53 V. c. 18, s. 2 (O.)—Ultra vires.

Procedure in criminal matters, which by the British North America Act is assigned exclusively to the Parliament of Canada, includes the trial and punishment of the offender; and therefore s. 2 of 53 V. c. 18 (O.), authorizing police magistrates to try and convict persons charged with forgery, is *ultra vires* of a provincial legislature.

Tytler, for the defendant.

J. R. Cartwright, Q.C., for the Crown.

NOVA SCOTIA.

In the Supreme Court.

REGINA v. CAMERON.

Criminal law—False pretences—Evidence.

Held, on an indictment for obtaining money under false pretences made to one Dimock to the effect that certain persons had done work under the defendant's supervision as road overseer, etc., that the evidence was sufficient to sustain the indictment.

In re OVENS.

Appeal—Commissioner of Mines—Bond given to the Queen.

On an appeal from a decision of the Commissioner of Mines that certain applications for prospecting licenses for gold were definite and should be accepted, the appellant gave his bond to the Queen and her successors, not to the party against whom he appealed.

Held, that the bond was good; WEATHERBE and GRAHAM, JJ., *dubitantibus*.

In re McLEOD.

Will—Secondary evidence of codicil—Degree of clearness requisite.

On an appeal from the judgment of a Surrogate Judge affirming the validity of a testator's will, the appellants sought to have a codicil of 17th June, 1882, admitted to probate as part of the will. The codicil in question was revoked by the testator and a

subsequent codicil made, but it was contended by the appellants that the revocation was invalid. The evidence as to the revoked codicil was indistinct as to some of its terms, and as to the principal provision in it, revoking a residuary bequest in the will, the witness said: "There were words in the June codicil that revoked the residuary clause in the will to the best of my recollection."

Held, that this evidence was not clear enough to warrant the Court in establishing the codicil.

MILLER v. DUGGAN.

Mortgage—Rectification—Sale under execution—Priorities.

The plaintiff sought the rectification of a mortgage by which the mortgagor conveyed one-sixth, instead of the whole, as was intended, of certain property. The mortgage was afterwards foreclosed and the land bought in by the plaintiff in 1887. After the mortgage, but before the foreclosure, a judgment was recovered against the mortgagor, and in 1889 the five-sixths unconveyed by the mortgage was sold under execution and bought in by the execution creditor.

Held, under the operation of the Registry Act, ss. 18 and 21, that the title of the purchaser in execution prevailed over the equitable right to have the mortgage rectified.

Grindley v. *Blakie*, 19 N. S. Reps. 27, approved.

WEATHERBE, J., dissented.

NOVA SCOTIA CENTRAL RAILWAY CO. v. HALIFAX BANKING CO.

Railway company—Bonds—Hypothecation—Power of attorney—Trust or mortgage

The plaintiffs made an agreement that their first mortgage bonds, then in the hands of a trust company, who held a trust deed of the undertaking to secure the bond holders, should

thenceforth be held by the trust company subject to the order of the Halifax Banking Company, in trust to secure the Halifax Banking Company and the firm of Eisenhauer and Wade the payment of their respective advances. The railway company by this instrument constituted the Halifax Banking Company their attorneys irrevocable, in case they should fail to carry out their agreements with Wade, or in case they should not pay all the advances made by Wade, to receive the bonds from the trust company "and to dispose of the same to the best advantage." The instrument contained a general power of substitution, and provided further that in case Eisenhauer and Wade should require the banking company to proceed with the sale of the bonds, the bank should either do so, or substitute Eisenhauer and Wade as attorneys, "with as full and ample authority as is hereby granted and conferred upon our said attorneys the Halifax Banking Company." The railway company did not in any respect perform the conditions of the foregoing power of attorney. The bank pressed for the payment of the amount advanced, and on 23rd April, 1890, commenced action against Eisenhauer and Wade for $444,229.83, all of which had been advanced to the railway company except $22,000 commissions. Eisenhauer then offered to purchase the bonds for the amount due the bank, but the agent of the railway company urged this should not be done, and made a proposal on 13th May, 1890, on behalf of the company, to Eisenhauer and Wade that they should arrange to have the bank substitute them for the banking company as attorneys for the sale of the bonds, and in case they should do so, the railway company agreed among other things that they, Eisenhauer and Wade, should have the sole and absolute right to sell the bonds at such price and upon such terms and subject to such conditions as they in their judgment might deem best in the interest of all concerned, and that they should have the power to hypothecate the bonds pending a sale. The bank accordingly, on 15th May, 1890, substituted Eisenhauer and Wade as attorneys for the sale of the bonds, and on the same day entered into an agreement with Eisenhauer and Wade, who paid them $100,000 on account of the indebtedness, whereby the time for payment of the balance was extended six months, the amount then due the bank being stated at $345,583.48, and in the agreement it was recited that Eisenhauer and Wade, as attorneys of the railway company, had hypothecated the bonds

to the banking company as collateral security for the payment of that sum. The hypothecation bore date the same day. It was in the form of a letter to the cashier of the banking company stating that Eisenhauer and Wade had deposited the bonds with the bank as collateral security for the payment of advances made, or to be made, upon negotiable paper, discounted or to be discounted for or on account of Eisenhauer and Wade, for the construction and equipment of the company's railway, also as collateral security for any overdraft obtained or to be obtained on account of such construction and equipment and all renewals thereof, and should the said negotiable paper, etc., "be not paid at maturity, it shall be lawful for the Halifax Banking Company, and it is hereby authorized, to dispose of or realize such securities, or any part of them, in such a way as may be deemed advisable by the directors, without notice to us or the said Nova Scotia Central Railway Company;" the proceeds to be applied to the payment of the negotiable paper, overdraft, or other advances or renewals. The railway company were duly notified of the substitution of Eisenhauer and Wade as attorneys, instead of the bank, and their agent and manager was aware that the bonds would have to be hypothecated and that they had been hypothecated. During the period of the six months' extension, efforts were made by the railway company, with which the bank had nothing to do, to effect a sale of the bonds. Failing in this, a local syndicate was organized by Eisenhauer and Wade, who offered, after the extension had run out, to purchase them for the sum of $515,000. The bank accordingly, on 17th December, 1890, notified the railway company that the bonds would be sold to a local syndicate for that sum unless before 12 o'clock noon on the 29th December, 1890, the amount due to the bank, namely $369,213.84, was paid to the bank at their office.

Held, that the bank could not be restrained from selling, nor Wade and Eisenhauer from purchasing, the bonds, the relation between the parties being that of mortgagee and mortgagor, and not of trustee and *cestui que trust*.

O'GORMAN v. WESTHAVER.

Discovery—Examination of party under Order 35, Rule 4—No facts in issue—Costs.

In an action against the defendant as maker of a promissory note, five grounds of defence were pleaded. The plaintiff joined issue on the first three grounds, and admitted the last two, which were those upon which the defendant chiefly relied. The pleas on which the plaintiff joined issue were struck out as false.

An order was subsequently granted by a County Court Judge, under Order 35, Rule 4, requiring the plaintiff to attend before the Court for examination under oath.

Held, on appeal, that the Judge had no power, as the pleadings stood, to make the order, there being no facts to be proved.

Appeal allowed; costs to abide the event.

SWORD v. SYDNEY & LOUISBURG RAILWAY CO.

Dower—Estoppel—44 V. c. 73, s. 15—Pleading—Amendment.

The plaintiff claimed dower out of a water lot in Sydney Harbour, granted to her husband after 1867 and before the Act vesting the foreshore in the province. The defendants relied on *Holman* v. *Green*, and also on their Act of incorporation, 44 V. c. 73, s. 15, ratifying and confirming the title of the company in the property which it had acquired, reserving to any person or persons the right to compensation only for any interest or lien on such property at the time of the purchase.

Held, that the defendants, holding their title from the plaintiff's husband, were estopped from setting up that the title never passed out of the Crown by virtue of the provincial grant.

Per TOWNSHEND and MEAGHER, JJ., that the Act of incorporation did not cover the plaintiff's claim.

Per RITCHIE and MEAGHER, JJ., that the statute should have been pleaded in bar of the plaintiff's claim; but

Per RITCHIE, J., that the Court could not disregard the statute, which had, in fact, been invoked by the plaintiff in support of her claim.

Per RITCHIE, J., that the proceedings being under a special statute, the plaintiff could not, by an amendment, claim compensation in the alternative without the defendants' consent.

In re EMMA STIRLING.

Habeas corpus—Infants—Insufficient return.

A return to a writ of *habeas corpus* to Miss S. to produce certain infants was set aside, and a writ of attachment was issued for contempt, but was suspended to enable S. to return the circumstances under which she had parted with the custody of the children, and show that she had made every effort possible to produce them. An amended return to the writ was made, showing that nothing had been done beyond writing a letter to her solicitors, and writing a few other letters, and sending a messenger, who was a stranger, to the persons who were supposed to have the children, and not accredited as coming from S. The messenger returned home unsuccessful and nothing further was done.

Held, that this return was insufficient, and that the writ of attachment should be put in force.

McLELLAN v. MORRISON.

Ex parte order—Setting off costs—Powers of trial Judge—Motion to make orders conform with decision—Forum—Amendment—Powers of appellate Court.

In an action for damages for assault and battery, and also for preventing the plaintiff from voting at an election, the Judge of the County Court before whom the cause was tried found certain issues in favour of the plaintiff and assessed the damages against T. M. and G. M., two of the defendants, at $50. The other issue he found for the defendants T. M. and G. M. On all the issues he found in favor of C., the remaining defendant.

Two orders were made on 18th December, 1888: one that the plaintiff recover the sum of $50 against the defendants T. M. and G. M., and that he have leave to enter judgment therefor, with costs to be taxed; the other dismissing the action against C. with costs to be taxed. Subsequently, on the same day, the defendants' solicitor obtained an *ex parte* order setting off the costs taxed on the issue found for T. M. and G. M., against the plaintiff 's costs, and directing that the amount be deducted from the plaintiff 's costs and judgment entered for the plaintiff for the residue.

Held, that the orders of the 18th December having disposed of all the matters before the Court, the Judge could not, while they were outstanding, grant the *ex parte* order setting off costs.

The Judge having been moved to rescind the orders, and an appeal having been taken from his refusal to do so :—

Held, that the orders were wrong and not in accordance with the judgment, but the remedy was either by appeal or by motion to the Court below to correct the error.

The County Court Judge having subsequently made an order embodying his decision as amended; on appeal,

Held, that if the rule for judgment was not in accordance with his judgment, the Judge had a right to make it agree with his decision. He could also, after judgment, make an order in relation to setting off costs, which could be included in the order for judgment.

The amended order not being in accordance with the judgment, omitting that part of the decision in favor of the defendants T. M. and G. M.:—

Held, that the Court on appeal, under Order 67, Rule 5, had power to make the order which should have been made by the Court below.

McLACHLAN v. MORRISON.

Dismissing action for want of prosecution—Notice required—N. S. Judicature Act—Order 60, Rule 9—Construction of agreement to continue cause.

The plaintiffs' action was dismissed for want of prosecution on an affidavit of the defendants' solicitor, made on the 7th

October, 1890, showing that issue was joined on the 18th January, 1887, and that no notice of trial had been since given. The order dismissing the action was appealed from on the ground, mainly, that the cause having been at issue for more than two years, and no proceeding having been had for more than a year from the last proceeding, the defendants were bound to give the plaintiffs a month's notice of their intention to proceed, and that no such notice had been given.

The appeal was allowed.

On the argument of the appeal the defendants' counsel sought to show that the rule as to notice does not apply where the continuance has been by agreement, and, for that purpose, to read the agreement for continuance relied on.

Held, *per* WEATHERBE, J., that the agreement could not be read. It should have been shown below, and was ground for a substantive motion.

Per GRAHAM, E.J., that the agreement must be construed as an agreement to continue until next term only.

O'DONNELL v. SMITH.

Attachment of debts—Assignment—Notice.

The assignee of a chose in action cannot avail himself of Order XLIII. ("attachment of debts") in the absence of a notice in writing.

COOK v. HARTLEN.

Pleading—Action against married woman doing separate business—Certificate required by R. S. c. 94, s. 53.

In an action for goods sold to a married woman doing business on her own account under the Married Women's Property Act, 1884, the defendant sought to take the ground of defence that no certificate was filed with the city clerk, as provided by R. S. c. 94, s. 53.

Held, that the defence could not be sustained without a plea

NELSON v. STUDIVAN.

Judgment—Irregularity—Motion to dismiss action where cause "called" at sittings.

The plaintiff's solicitor declined to proceed with the trial of his cause when called, and the cause was marked "called," and the argument of a cause previously tried was heard, after which the presiding Judge announced that that would be the last day of the sittings and called for motions. The defendant's solicitor then moved to dismiss the action, and obtained an order, the plaintiff having shown cause against the motion.

Held, that the plaintiff having shown cause, the judgment was regular.

Quære, whether the defendant must not have moved at the trial in order to make the judgment good, had not the plaintiff shown cause.

Per GRAHAM, E.J.—The judgment was irregular, but having been made in the hearing of both parties, the plaintiff should have appealed and not moved to rescind.

MILLER v. DODGE.

Promissory note—Presentment to charge maker.

Where a note was, in the body of it, made payable at a particular place:—

Held, that a presentment made after six years had elapsed, and just before action, was sufficient to charge the maker.

In re BLAIR.

Habeas corpus—Order discharging prisoner—Review of.

On an application to set aside an order of a single Judge on a writ of *habeas corpus*, releasing a prisoner imprisoned on a commitment under the Liquor License Act, 1886:—

Held, that the Court has no power to review, by way of appeal or otherwise, the order of a Judge discharging a prisoner on *habeas corpus*.

In re Sproule, 12 S. C. R. 140, distinguished.

THE TRUSTEES OF SCHOOL SECTION 34 v. THOMAS.

Particulars—Action for money received.

In an action for money received the plaintiff in his particulars claimed $73.40 for a balance of money collected by defendant for rent of school-house. The Judge below refused an order for better particulars.

Held, that the better particulars were rightly refused.

MANITOBA.

In the Queen's Bench.

[TAYLOR, C.J., 17TH OCTOBER, 1892.

In re CONFEDERATION LIFE ASSOCIATION AND BEALL.

Real Property Act—Reference—Devise to beneficial owner, subject to a charge of debts—Mortgage by devisee and executrix for private purposes—Subsequent sale and mortgage.

In 1882 William Beall was the owner of the land in question, subject to a mortgage which he had made on 12th July, 1881, in favour of the Confederation Life Association. He died in April, 1882, after making his will, by which he appointed his wife, afterwards Mrs. Moore, and W. Pearson executors, directing them to pay all his just debts, funeral expenses, and legacies out of his estate. He also bequeathed, after payment of the debts and funeral expenses, to his infant daughter a legacy of $5,000, to be paid to her at the age of 21. He then gave his wife all his real estate and all his chattels and household furniture, with the exception of paying the above-named legacy, and directed his executors to educate and provide all necessaries for his infant child until she became 21, over and above the legacy of $5,000. The will was proved by the executrix and executor, but the latter died in September, 1883.

In September, 1882, the widow executed a mortgage on the land in question in favour of the Confederation Life Association

for securing repayment of $2,000 then borrowed by her. Some years afterwards a suit was begun to foreclose the mortgage, in which a decree was made whereby it was declared that the legacy in favour of the infant and the provision for her education and maintenance were a charge on the land in priority to the mortgage of September, 1882, and the usual accounts and inquiries were directed. This decree was followed in 1891 by a final order of foreclosure. Subsequently the infant filed a bill for redemption of the mortgage made by the testator, dated 12th July, 1881, and thereupon a decree for redemption was made, under which the amount due was paid and a discharge of the mortgage executed.

In October, 1891, before the making of the final order of foreclosure in the first suit, and before the redemption of the mortgage in the second suit, a certificate of title to the land in question under the Real Property Act was issued to Mrs. Moore, sole surviving executrix and devisee under the will of William Beall, expressed to be subject to the mortgage of 12th July, 1881, the charge in favour of the infant, the mortgage of 1st September, 1882, and a writ of *fi. fa.* lands in favour of the Confederation Life Association, the last two being declared to attach upon the interest of Mrs. Moore as devisee only. In the month of November following Mrs. Moore executed a transfer of part of the land in question to one Curzon, and mortgaged the remainder of it to the executors of the late Sir John A. Macdonald.

Upon the transfer and mortgage being brought to the District Registrar for registration, he determined to issue a certificate of title to Curzon free and clear from the charge in favour of the infant, the mortgage of the 1st September, 1882, and the writ of *fi. fa.*, and also upon being satisfied that the mortgage of 12th July, 1881, had been paid off, to issue a certificate of charge on the remainder of the land, declaring the mortgage to the executors of the late Sir John A. Macdonald to be the first charge upon it. To this the Confederation Life Association objected, and required the District Registrar to set forth in writing the grounds of his decision, which he did.

From his decision the association appealed, contending that, under the circumstances, the devisee was the person to convey, and by virtue of the mortgage from her of September, 1882, which they had foreclosed, they had a complete title to the land.

Held, that the decision of the District Registrar should be sustained, and the appeal dismissed with costs. He had expressly found that the sale and mortgage were necessary for the purpose of paying debts, and also of providing for the maintenance and education of the infant in accordance with the terms of the will. On the other hand, the association, when it advanced the money under the mortgage of September, 1882, had notice that it was being borrowed for the private purposes of the executrix and devisee, to build a house on land devised to her, and not for the payment of debts, or for the benefit of the testator's estate.

Dawson, for the Confederation Life Assocation.

C. P. Wilson, for the Attorney-General.

Cameron, for the infant.

Phippen, for the executors of Sir J. A. Macdonald.

[24TH OCTOBER, 1892.

In re ST. BONIFACE PROVINCIAL ELECTION.

Election petition — Status of petitioner — Deposit — Security—"Current money of Canada."

The third preliminary objection to an election petition was that the petitioner was not an elector who had a right to vote, nor a candidate, nor qualified to present a petition.

The petition was, "the petition of Francois Carrier, of the town of St. Boniface, in the electoral division of St. Boniface, in the province of Manitoba, secretary-treasurer of the municipality of St. Boniface." It was signed by "Francois Carrière," while the affidavit, in support of the petitioner's status was signed "Francois Carrière, Jr." On the list of electors there was no "Francois Carrier," nor "Francois Carrière, secretary-treasurer," nor "Francois Carrière, Jr., secretary-treasurer," but there were these names, "Francois Carrière, livery stable," "Francois Carrière, Jr., livery stable," and "Francois Carrière, Sen., farmer." It was suggested that since the making up of the list of electors the petitioner had changed his occupation.

Held, that the petitioner should, if his name was upon the list, have established his status by producing a properly verified copy of the list of electors, and some evidence of his identity with a person whose name appeared there.

A futher objection was that no security had been given in accordance with s. 22 of the Manitoba Controverted Elections Act, and that $750 current money of Canada had not been deposited with the prothonotary as required by the Act.

The 22nd section of the Act is as follows :—" The security shall be given by a deposit with the prothonotary of the sum of $750 current money of Canada."

There was no dispute as to what was in fact deposited. It was a deposit of bank bills of a bank or banks chartered by the Parliament of Canada.

Held, that the $750 current money of Canada, required by s. 22 to be deposited, must be money authorized by chapters 30 and 31 of the Revised Statutes of Canada, that is gold coin or Dominion notes.

The petitioner having failed to prove his status, and no deposit such as is required by the statute having been made, these objections were allowed and the petition dismissed with costs.

Hagel, Q.C., for the petitioner.

Howell Q.C., and *C. P. Wilson*, for the respondent.

[DUBUC, J., 11TH OCTOBER, 1891.

ASHDOWN v. MONTGOMERY.

Statute of Limitations—Payment on account.

The plaintiff declared on three promissory notes respectively due in May, June, and July, 1885, and on the common counts.

The action was commenced on 16th September, 1891.

The defendant pleaded, *inter alia*, the Statute of Limitations, and relied on that plea for his defence. The last of the three notes sued on bore date 8th May, 1885, and the last two items, for goods sold by the plaintiff to the defendant, were dated 15th and 30th May, 1885, respectively. On the credit side of the account there was a cash item of $97, dated 22nd September, 1885.

Held, that the plaintiff was entitled to a verdict for the amount proved.

Culver, Q.C., for the plaintiff.

Elliott, for the defendant.

IN CHAMBERS.

[DUBUC, J., 11TH OCTOBER, 1892.

IMPERIAL BANK v. SMITH.

Judgment debtor — Examination of—Order for — Powers of County Court Judge in Queen's Bench action — "Party to action" —R. S. Man. c. 36, s. 65.

An order was taken out by the plaintiffs in this action, which was in the Court of Queen's Bench, to examine both defendants as judgment debtors. The order was made by a County Court Judge. The defendant Kain submitted to the examination, but refused to answer certain questions put to him. A summons was then taken out by the plaintiffs to commit him, or to compel him to attend at his own expense to answer the questions.

A preliminary objection was taken that the County Court Judge had no jurisdiction to make the order to examine, and the order was therefore null and void.

The authority of the County Court Judge to transact business which may be exercised by a Judge of the Court of Queen's Bench in Chambers is derived from R. S. Man. c. 36, s. 65. One of the powers so conferred on the County Court Judge is to hear, "applications to examine any party . . . to an action under any statute of the Province." The contention of the defendant Kain was that a judgment debtor was not a party to an action as contemplated by the statute.

Held, that the County Court Judge was authorized to make the order in question. The word "action" was wide enough to include proceedings taken after judgment and leading up to execution, or other mode of obtaining satisfaction, as the examination in question.

Aikins, Q.C., for the plaintiffs.

Colin H. Campbell, for the defendant Kain.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [8TH NOVEMBER, 1892.

DANCY v. GRAND TRUNK R. W. CO.

Railways and railway companies—Ticket—Contract—Condition—Damages—"Via direct line."

A condition in a railway ticket as to travelling "*via* direct line" was rejected as meaningless, each of three possible routes being circuitous, though one was shorter in point of mileage than the others.

The amount of damages allowed by the jury to the plaintiff because of his removal from the train while taking one of the longer routes was reduced by this Court as unwarrantably large.

Judgment of the Queen's Bench Division, 20 O. R. 603, varied.

Aylesworth, Q.C., for the appellants.

Lount, Q.C., for the respondent.

HOWLAND v. DOMINION BANK.

Writ of summons—Extending time for service—Rule 238—Ex parte order—Rescission of—Rule 536—Jurisdiction of Master in Chambers—"Good reason"—Statute of Limitations.

Where an order has been made, on the *ex parte* application of the plaintiff, under Rule 238 (a) extending the time for service of the writ of summons, it is open to the defendant to move against it within the time or extended time prescribed by Rule

536, and to shew, if he can, that there was no good reason for making it, even though the result of setting it aside may be that the action will be defeated altogether by the operation of the Statute of Limitations.

The Master in Chambers, where he has made such an order, has jurisdiction under Rule 536 to reconsider and rescind it.

The reason offered by the plaintiffs for an extension of the time for service of the writ was that until they should ascertain, by the result of the reference in another pending proceeding, that there had been a fund in the hands of one of the defendants in respect of which it would be worth while to prosecute this action, it would be advisable to delay the service of the writ, as, in the event of there being no fund, this action would be useless. There had been delay in prosecuting the reference in the other proceeding, the plaintiffs having the conduct of it. The Master in Chambers, upon the application of the defendants, set aside his own *ex parte* order extending the time for service of the writ, and his decision was affirmed by a Judge in Chambers and a Divisional Court.

Held, that the three tribunals could not be said to have been wrong in holding that no good reason was shown for extending the time.

Arnoldi, Q.C., for the plaintiffs.

McMichael, Q.C., for the defendants.

GALT, C.J.]

In re GILLESPIE AND CITY OF TORONTO.

Municipal corporation—Local improvements—By-law.

A by-law imposing assessments for local improvements initiated by the city was quashed where the work done and the payment therefor were different from those set out in the notice of intention to do the work.

Judgment of GALT, C.J., upholding the by-law under legislation which the city on appeal waived the benefit of, reversed.

Aylesworth, Q.C., for the appellants.

H. M. Mowat, for the respondents.

In re POUNDER AND VILLAGE OF WINCHESTER.

Municipal corporations—By-law—Voters.

A local option by-law carried by a vote of 71 to 15 was quashed, where it appeared that the returning officer had announced that he would not accept the votes of tenant voters, 74 of whom were on the list, though it was not shown that more than a very small number of these voters had made any attempt to vote or had expressed any intention of voting.

Judgment of GALT, C.J., reversed; MACLENNAN, J.A., dissenting.

Du Vernet, for the appellant.

Langton, Q.C., for the respondents.

ARMOUR, C.J.]

WATT v. CITY OF LONDON.

Assessment and taxes—Place of business—Branch—Court of Revision.

A firm carrying on business at Brantford were held not assessable at London in respect of a large quantity of sugar stored by them in a warehouse there, orders for sugar being sent to the firm at Brantford by their traveller in London, and the invoices being made out at and forwarded from Brantford, though the sugar was shipped from London; and repayment of taxes, paid under protest after ineffectual appeals to the Court of Revision and the County Court Judge, was ordered.

Judgment of ARMOUR, C.J., reversed.

Gibbons, Q.C., for the appellants.

W. R. Meredith, Q.C., for the respondents.

ROBERTSON, J.]

ZIMMER v. GRAND TRUNK R. W. CO.

Railways—Damages—Limitations—51 V. c. 29, s. 287 (D.)—R. S. O. c. 135, s. 5.

The plaintiffs' father was killed on the 10th of February, 1891, by a fall from a bridge which crossed the defendants' line and had been negligently allowed by them to be out of repair. The action was begun on the 10th of December, 1891, no letters of administration having been taken out.

Held, per BURTON, OSLER, and MACLENNAN, JJ.A., HAGARTY, C.J.O., expressing no opinion; that that this was not "damage sustained by reason of the railway" and that the limitation clauses of the Railway Act did not apply.

Held, also, *per* HAGARTY, C.J.O., BURTON and MACLENNAN, JJ.A., OSLER, J.A., expressing no opinion, that the provisions of R. S. O. c. 135 (Lord Campbell's Act) are not affected by special railway legislation of this kind, and that the action was begun in time.

Judgment of ROBERTSON, J., 21 O. R. 628, affirmed on other grounds.

McCarthy, Q.C., and *W. Nesbitt*, for the appellants.

Rowe, for the respondents.

P.M., TORONTO.]

REGINA v. EDWARDS.

REGINA v. LYNCH.

Constitutional law—Evidence—Justice of the peace—52 V. c. 15, s. 5.

A case can be stated by a justice of the peace under 52 V. c. 15, s. 5, for the judgment of the Court of Appeal, only when the constitutional validity of the statute under which he acquires jurisdiction is called in question, and not when the constitutional validity of some other statute, such as a statute regulating procedure or evidence, is collaterally attacked.

DuVernet, for the defendants.

J. R. Cartwright, Q.C., for the Crown.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[BOYD, C., 14TH OCTOBER, 1892.

STEWART v. ROWSOM.

Mortgage—Power of sale—Exercise of—Sale of timber only—Notice of sale.

A mortgagee of timbered land, whose mortgage contained the ordinary short form of power of sale authorized by R. S. O. c. 107, in the exercise of such power sold the timber without the land:—

Held, that the sale as an exercise of the power was void.

Held, also, upon the evidence, that no such notice of sale was given to the plaintiff as he was entitled to under the power.

D. Robertson, for the plaintiff.

H. P. O'Connor, Q.C., for the defendants.

CHANCERY DIVISION.

[BOYD, C., 28TH SEPTEMBER, 1892.

FAREWELL v. FAREWELL.

Will—Mortmain—Impure personalty—Legacy to promote temperance legislation—Validity of bequest.

Action for construction of a will.

Held, (1) that a promissory note collaterally secured by mortgage on land was, at the death of the testator, impure personalty within the authorities.

(2) That upon the language of the will the testator had directed that the pure personalty was to be so marshalled as to give priority to the bequest in the will of $8,000 to the Foreign Christian Missionary Society of Cincinnati, Ohio.

(3) As to the bequest to trustees of $2,000 upon trust "to apply the same in such lawful ways as in their discretion they may deem best, in order to promote the adoption by the Parliament of the Dominion of Canada of legislation prohibiting totally the manufacture or sale in the Dominion of intoxicating liquor to be used as a beverage, and in order to give practical aid in the enforcement of such legislation when adopted, and whether by educating and developing a strong public sentiment in its favour or by other and more direct means, or in such other ways as my trustees shall think best":—

Held, that this was a good charitable legacy, being for a lawful public or general purpose, and not contrary to morality or public policy. The testator merely sought to procure what he deemed a desirable change in the law by constitutional means.

S. H. Blake, Q.C., for the plaintiffs.

A. H. Marsh, Q.C., *Maclaren*, Q.C., and *G. H. Grierson*, for the defendants.

[16TH NOVEMBER, 1892.

CLARKE v. COOPER.

Amendment—Mortgage action—Omission to include part of mortgaged lands—Amending writ of summons after judgment—Rules 444, 780.

Under the liberal powers of amendment now given by Rules 444 and 780, the writ of summons may be amended after judgment.

And where the plaintiff by mistake omitted from the description of lands in the writ of summons in a mortgage action, a parcel included in the mortgage, an order was made, after judgment and final order of foreclosure, vacating the final order directing an amendment of the writ and all proceedings, and allowing a new day for redemption by a subsequent incumbrancer who did not consent to the order; and in default the usual order to foreclose.

Masten, for the plaintiff.

D. T. Symons, for the defendants the Quebec Bank.

[ROBERTSON, J., 24TH SEPTEMBER, 1892.

In re HARTE AND THE ONTARIO EXPRESS AND TRANSPORTATION COMPANY.

Dominion Winding-up Act, s. 56—Dominion and Provincial laws—Claim under Quebec law.

Held, that there is nothing in s. 56 of the Dominion Winding-up Act which alters or interferes with the *lex loci contractus*; and therefore, in the case of a lease entered into in Montreal, where the Quebec law provided that on the insolvency of the lessee, the rent not yet exigible by the terms of the lease, should become so by reason of the insolvency of the tenant, a claim for the whole rent to the end of the term must be allowed to the lessors in the liquidation proceedings which were being carried on under the Dominion statute.

Maclaren, Q.C., for the New York Piano Co.

Hoyles, Q.C., for the liquidator.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 25TH JUNE, 1892.

LAWSON v. McGEOCH.

Assignments and preferences—Intent to prefer—Presumption—R. S. O. c. 124—54 V. c. 20—Chattel mortgage—Prior agreement therefor—Effect of.

The Act 54 V. c. 20, amending R. S. O. c. 124, enacts that as to transactions coming within the amending Act, if impeached within the limited period, the intent to prefer is presumed, whether the act was done voluntarily or under pressure.

Held, that the proper construction is not that the presumption raised of an intent to prefer is an irrebuttable one, but that the onus of establishing that no such intent existed is cast on the person supporting the transaction.

Cole v. *Porteous*, 19 A. R. 111, distinguished.

A chattel mortgage was given in pursuance of a previous agreement therefor, a present advance being then made under the *bona fide* belief that it would enable the debtor to pay all his outstanding debts, and that he was solvent, a belief still entertained by the mortgagee when the mortgage was actually given.

Held, that the mortgage was valid.

Kappele, for the plaintiffs.

Shilton, for the defendants.

KENNIN v. MACDONALD.

Solicitor and client—Lien for costs—Taking notes and leaving country—Waiver of lien—Replevin—Damages—Condition of replevin bond.

The plaintiff, a solicitor claiming a lien for costs on certain documents in his hands belonging to the defendant M., settled with him at $225, taking a note therefor payable on demand. He then went to the United States, leaving the note and the documents with another solicitor as his agent. The defendant M., stating that he required the papers or some of them for use in his business, brought replevin proceedings in the Division Court, giving a bond to prosecute the suit with effect and without delay, or to return the property replevied and to pay the damages sustained by the issuing of the writ; and there was a breach of the bond in not prosecuting the suit with effect. Under the replevin order the defendant M. procured some of the papers only, and these were tendered back to the plaintiff and refused, the defendant stating that they were of no value, the agent having retained the valuable ones. In an action by the plaintiff to recover the damages he had sustained by the replevin:—

Held, by BOYD, C., the trial Judge, that if any lien existed, which was questionable, by reason of the taking of the note and departure from the country, it was displaced by the replevin suit; but, in any event, the plaintiff had failed to prove any actual damage, and though there might be judgment for nominal damages and costs, there would be a set-off of the defendants' costs of trial; and therefore the better course was to dismiss the action without costs.

Quære as to the amount of damages recoverable.

The fact of the condition of the bond being in the alternative instead of the conjunctive remarked on.

On appeal to the Divisional Court the judgment was affirmed.

H. J. Scott, Q.C., for the plaintiff.

The defendant *Macdonald*, in person.

W. H. Wallbridge, for the defendants the Johnstons.

CRANE v. RAPPLE.

Partnership—Sale of land—Parol contract—Statute of Frauds—Possession—Partner's share—Specific performance.

Land owned by two persons in partnership was sold under a parol contract by one of the partners to a purchaser, under the belief that the co-partner would join in the sale, and the whole be conveyed. The purchaser was put into possession; but the co-partner refused to carry out the sale.

Held, that the so placing the purchaser in possession was sufficient to prevent the Statute of Frauds being set up as a bar to the proof of a parol contract; and that the purchaser could elect to take the selling partner's share with an abatement of the purchase money and specific performance as against him.

Walter Cassels, Q.C., for the plaintiffs.

Watson, Q.C., for the defendant.

MEYERS v. HAMILTON PROVIDENT AND LOAN SOCIETY.

Judgment—Subsequent order to take accounts—Rules 551, 782.

After judgment had been pronounced in an action declaring the estate the plaintiff took in certain lands under his father's will, and which he had mortgaged to the defendants, and refusing to restrain the sale thereof under the mortgage, the sale was proceeded with and the lands sold. Subsequently, on the plaintiff's application, a Judge's order was obtained directing a reference to the clerk in Chambers to take the mortgage accounts and to the taxing officer to tax the defendants' costs; and while this application was pending the defendants obtained an *ex parte* order to pay the surplus proceeds of the sale into Court.

Held, without deciding whether a petition was necessary as upon an application under Rule 782, that the order to take the accounts, etc., was properly made under Rule 551.

W. H. Blake, for the plaintiff.

Hoyles, Q.C., for the defendants.

McLAUGHLIN v. HAMMILL.

Interpleader—Claim for rent—Right of sheriff to interplead—Rule 1141.

The express statutory provision giving sheriffs the right to interplead where a claim against the goods is made by a landlord for rent was omitted from the Revised Statutes, it being stated in the appendix thereto that it was superseded by Rule 1141, which provides that the sheriff, etc., may interplead where a claim is made, etc., to any money, goods, or chattels, etc., taken in execution, etc., by any person other than the person against whom the process issued.

Held, that the right to interplead where a claim for rent is made still exists.

Aylesworth, Q.C., for the sheriff.

Strathy, Q.C., for the execution creditor.

H. S. Osler, for the landlord.

IN CHAMBERS.

[BOYD, C., 14TH NOVEMBER, 1892.

UHRIG v. UHRIG.

Judgment debtor—Examination of—Refusal to be sworn.

Where a judgment debtor attends for examination, but refuses to be sworn, he should be ordered to attend and take the oath and submit to be examined at his own expense; if he makes default, process of contempt may issue on further proof.

E. F. Blake, for the plaintiff.

[GALT, C.J., 15TH SEPTEMBER, 1892.

HOGABOOM v. COX.

Discovery—Examination of party in vacation—Production of documents in the hands of a third person.

A party to an action is not bound to attend for examination for discovery during vacation.

Where a party to an action referred in his affidavit on production to certain documents as being in the hands of a third person, who refused to give them up until paid certain charges which were disputed:—

Held, by the Master in Chambers, that the opposite party must content himself with inspecting the documents and taking copies, unless he should agree to indemnify his opponent against the cost of obtaining the documents.

W. R. Riddell, for the plaintiff.

A. Hoskin, Q.C., for the defendants.

[27TH OCTOBER, 1892.

WEBSTER v. CITY OF TORONTO.

Discovery—Examination of officer of municipal corporation—Street foreman.

In an action for damages for negligence in keeping a public way in a state of disrepair:—

Held, that a street foreman in the employment of the defendants under their street commissioner, who stated that he had general supervision of the roads and sidewalks, was not an officer examinable for discovery under Rule 487.

Thomas v. *Grand Trunk R. W. Co.*, 12 Occ. N. 42, followed.

W. H. P. Clement, for the plaintiff.

H. M. Mowat, for the defendants.

COLEMAN v. CITY OF TORONTO.

Discovery—Examination of officer of municipal corporation—Medical health officer.

The medical health officer of a municipal corporation, though appointed by the council and paid by the corporation, is not an officer of the corporation examinable for discovery under Rule 487.

Forsyth v. *Canniff*, 20 O. R. 478, followed.

R. Boultbee, for the plaintiff.

H. M. Mowat, for the defendants.

[3RD NOVEMBER, 1892.

COUSINEAU v. PARK.

Costs—Taxation—Final certificate—Objections—Appeal—Interlocutory costs—Rule 1230.

Where under the judgment in an action the costs thereof are to be taxed to one party, and under interlocutory orders certain costs are payable to the opposite party in any event on the final taxation, the taxing officer should not close the taxation of the

costs of the action and certify the result until the interlocutory costs are taxed, unless there is unreasonable delay in bringing in a bill of the latter costs. And a party should not be deprived of his appeal from the taxation by reason of the officer having issued his certificate before the party has carried in his objections, as required by Rule 1230, where he has not delayed, and has acted in good faith, relying on the officer not issuing his certificate until after the taxation of the interlocutory costs.

Cuerrier v. *White*, 12 P. R. 571, distinguished.

Roche, for the plaintiffs.

Douglas Armour, for the defendants.

[FERGUSON, J., 5TH NOVEMBER, 1892.

DELAP v. CHARLEBOIS.

Security for costs—Nominal plaintiff—Amount of security.

An action was begun by D. as plaintiff, suing on behalf of himself and all other shareholders in the defendant company, to set aside a judgment obtained by the defendant C. against the company. D., who lived out of the jurisdiction, amended the writ of summons before serving it by adding A., another shareholder, as a plaintiff. Upon a motion by C. for security for costs, A. was examined, and it appeared from his examination that he had never intended bringing any action himself; that he did not know the nature or the position of the action; and that he did not know D. He had, however, written a formal letter authorizing D.'s solicitors to have him added as a plaintiff. It also appeared that A. had no property except some household furniture of trifling value.

Held, that A. was merely a nominal plaintiff, and that C. was entitled to an order for security for costs.

There being reason to suppose that the action would be an expensive one, the plaintiffs were ordered to give security in the sum of $1,000.

Arnoldi, Q.C., for the plaintiffs.

W. M. Douglas, for the defendant Charlebois.

[THE MASTER IN CHAMBERS, 5TH NOVEMBER, 1892.

FERGUSON v. GOLDING.

Venue—Change of—County Court action—Intituling of papers.

Where a motion is made to a Judge of the High Court or the Master in Chambers under Rule 1260 to change the venue in a County Court action, the papers should not be intituled in the High Court of Justice, but in the County Court.

Masten, for the plaintiff.
C. W. Kerr, for the defendant.

[8TH NOVEMBER, 1892.

McLENNAN v. FOURNIER.

Appearance—Default of—Noting pleadings closed—Rule 393.

Where defendants do not appear, an order may be made, by analogy to Rule 393, directing the proper officer to note the pleadings closed, but without such an order the officer has no power to do so.

Morse v. *Lambe*, *ante* p. 398, explained.

E. F. Blake, for the plaintiff.
J. A. MacIntosh, for the defendants.

MASTER'S OFFICE.

[THE MASTER-IN-ORDINARY, 2ND NOVEMBER, 1892.

TAYLOR v. SWENEY.

Mortgage—Marshalling securities—Charging mortgagee with amount bid at auction.

The defendant Sweney held a mortgage on certain properties in Chester which was secured by a collateral mortgage on a farm in Peel. The plaintiff held a subsequent mortgage on the Peel farm. The defendant Sweney also held a second mortgage on the Chester properties; and there were also subsequent mortgages on these Chester properties held by persons not parties to

this action, which was brought by the plaintiff as second mortgagee of the Peel farm against the defendant Sweney and the mortgagor. The pleadings stated that the defendant Sweney caused the Chester properties to be offered for sale under certain powers of sale in his mortgage, when $11,200 was bid, but not accepted, and the properties were withdrawn from sale; and caused the Peel farm to be offered for sale, and it was sold for $14,500. The plaintiff claimed that he was entitled to have the defendant Sweney first resort to and dispose of the Chester properties before resorting to the Peel farm, and that he ought to have accepted the $11,200 and not withdrawn the Chester properties from sale, and that the defendant Sweney should now be charged with that sum, and that the securities should be marshalled and the defendant Sweney held to be satisfied as to the $11,200 out of the Chester properties, or that, as he had deprived the plaintiff of his security on the Peel farm, the plaintiff should be declared entitled to stand in his place against the Chester properties.

E. D. Armour, Q.C., and *John Leys*, Q.C., for the plaintiff.

W. Cassels, Q.C., and *Lockhart Gordon*, for the defendant Sweney.

Kingsford, for the defendant Taylor.

MR. HODGINS, Q.C., after citing *Lanoy* v. *Duke of Athol*, 2 Atk. 444; *Aldrich* v. *Cooper*, 8 Ves. 394; *Averald* v. *Wade*, L. & G. temp. Sugden at p. 259; *Dolphin* v. *Aylward*, L. R. 4 H. L. at p. 502; *United States* v. *Duncan*, 12 Ill. 528; *Barnes* v. *Racster*, 1 Y. & C. (C. C.) 401; *Brigden* v. *Bignold*, 2 Y. & C. (C. C.) 377; *In re Mower's Trusts*, L. R. 8 Eq. 110; *Gibson* v. *Seagrim*, 20 Beav. at p. 619; *Wellesley* v. *Earl Mornington*, 17 W. R. 855; *Stronge* v. *Hawkes*, 4 DeG. & J. 632, proceeded:—

Here the defendant Sweney has another right in respect of his second mortgage on the Chester properties, and that right may be looked upon as representative of the subsequent mortgagees of these properties. Under that further or third right in respect of these properties, I think the doctrine of *Barnes* v. *Racster* and *Brigden* v. *Bignold* must be held to be applicable, and that the defendant Sweney's mortgage must be charged ratably on the Chester and Peel properties according to their respective values.

There is nothing before me to warrant my charging the defendant with the amount of $11,200 bid for the Chester properties; those properties are still in specie, and, besides, the

subsequent mortgagees have a right to be heard before such a liability is fastened upon their security. The action of the defendant in fixing a reserved bid is favoured in equity as a means of preserving the estate from being sold at a sacrifice and as a protection for the claims of other parties interested in the estate. . . . "The practice of the Court of Chancery in modern times is to stipulate expressly for the right not to sell under a fixed price:" *per* Lord Cranworth, L.C., in *Mortimer* v. *Bell*, L. R. 1 Ch. at p. 14. And the Court will sometimes actively interfere to compel a vendor, where the rights of others are affected, to fix a reserved bid when the property is offered for sale by auction: *Downey* v. *Dennis*, 16 O. R. 219.

NEW BRUNSWICK.

In the Supreme Court.

[21st October, 1892.

KINNEAR v. SPURR.

Appeal—Contradictory evidence—Finding of trial Judge on facts—Duty of appellate Court—Power of Court to direct issue—Resulting trust.

This was an appeal by the plaintiff from the decision of the Judge in Equity. The bill was filed to obtain a decree declaring that the plaintiff was entitled to an undivided half of a tract of land granted by the Crown to the defendant, part of it in January, 1869, and part in January, 1871, and containing on the whole about 102 acres, and that the defendant should convey to the plaintiff such undivided half of the land. Upon evidence of a contradictory nature, the Equity Judge decided in favour of the defendant and dismissed the bill.

Held, that the questions on the hearing were entirely questions of fact, and there was no legal question involved. In such cases it is well settled, not only by the decisions of this Court, but by the cases decided by the Supreme Court of the Dominion and in the House of Lords, that an appellate Court will not interfere.

Held, also, that this Court had the power to direct an issue to try the question whether the defendant did purchase the property in the manner and under the circumstances charged in the bill.

Per ALLEN, C.J.—One of the objections raised to the plaintiff's right to recover in this case was that what was alleged by him amounted to an agreement by the defendant to sell land to the plaintiff, which, not being in writing, was void by the Statute of Frauds. The answer to this was that the plaintiff had an equitable interest in the land, which was a resulting trust, and a written agreement was not necessary under the Statute of Frauds. As the Equity Judge found against the alleged agreement, it was not necessary to decide the question of a resulting trust; but the evidence given on behalf of the plaintiff would not seem to make out such a trust.

Pugsley, Q.C., and *Gilbert*, Q.C., for the plaintiff.

Barker, Q.C., and *Weldon*, Q.C., for the defendant.

Ex parte BARBERE.

Justice of the peace—Summary conviction—Interest—Bias—Certiorari—Plea of "guilty"—Appeal.

This was an application for a *certiorari* to remove a conviction for a common assault. The ground relied upon was bias on the part of the convicting magistrate, he being the uncle of the defendant. It appeared from the affidavit used on the application that the defendant had appeared before the magistrate and pleaded guilty to the charge and was fined.

Held, that, as the defendant had appeared and pleaded guilty, and as he had a right of appeal to the County Court, this Court would not interfere.

Gregory, Q.C., for the applicant.

L. A. Currey, contra.

In re LEE.

Absconding debtor—Warrant—Goods seized under—Custody of the law—Distress.

The household goods of L. were seized by a sheriff under a warrant issued by virtue of the Absconding Debtors Act, C. S. N. B. c. 38. The landlord claimed the right to distrain upon the goods for arrears of rent, and the question raised was whether they were liable to distress for rent.

Held, that the goods were in the possession of the sheriff under the warrant, and therefore in the custody of the law, and were not liable to be distrained for rent.

Millidge, for the applicant.

A. A. Wilson, contra.

GIRVAN v. McLEAN.

Costs—Motion for new trial—Court equally divided.

On a motion to review the taxation of costs:—

Held, that on a motion for a new trial, where the Court divided equally, the rule dropped, and neither party was entitled to costs.

George W. Allen, for the applicant.

Ex parte WARD.

Arrest—Disclosure—Order for discharge—Jurisdiction of Commissioner.

This was an application to set aside an attachment. R., a commissioner under C. S. N. B. c. 38, had made an order discharging the debtor from arrest, at the suit of K. At the disclosure the defendant disclosed certain property which the commissioner ordered to be attached. There was nothing in the order for discharge and attachment to show the jurisdiction of

the commissioner, or where the disclosure proceedings were held. R. was described merely as a commissioner.

Held, that the order for discharge was bad because it did not shew the jurisdiction of the commissioner.

Jordan, Q.C., for the applicant.

Gregory, Q.C., contra.

Ex parte KNAPP.

Arrest—Disclosure—C. S. N. B. c. 38—Order for discharge.

This was an application to set aside an order for arrest made under C. S. N B. c. 38. The defendant, who was arrested on a capias, had made a disclosure and had obtained an order for his discharge. At the disclosure proceedings he swore that he did not owe the plaintiff but that the plaintiff owed him. The applicant rested his motion to set aside the arrest on this fact.

Held, that within the meaning of the statute the defendant must be considered a debtor; and the motion was refused.

Gregory, Q.C., for the applicant.

Jordan, Q.C., contra.

Ex parte GALLANT.

Canada Temperance Act—Summary conviction—Justice of the peace—Interest—Bias.

This applicant had been convicted for violation of the Canada Temperance Act, and he now applied for a *certiorari* to remove the conviction, on the ground that the commissioner before whom the case was tried was a registered druggist and chemist and therefore disqualified from hearing the case, from bias.

Held, that the possibility of bias in such a case was too remote.

Ex p. Laughey, 28 N. B. Reps. 658, distinguished.

G. W. Allen, for the applicant.

F. A. McCulley, contra.

Ex parte CONWAY.

Canada Temperance Act—Summary convictions—Omission to provide for costs of distress—Amendment by the Court—R. S. C. c. 178, s. 87.

The applicant, having been summarily convicted for an offence against the Canada Temperance Act, applied for a *certiorari*, on the ground that the conviction did not correspond with the minute of adjudication, the conviction omitting to provide for the costs and charges of distress in the event of the defendant being imprisoned for non-payment of the fine.

In drawing up the conviction the magistrate followed the form T. in the schedule to 51 V. c. 34, instead of the form J. 1, in the schedule to the Summary Convictions Act, R. S. C. c. 178. The latter form has the words, "unless the said several sums and all costs and charges of the said distress . . . are sooner paid;" but the form T. has not these words, and the conviction here did not order that the costs of distress should be paid by the defendant before he should be released from imprisonment.

Held, that the conviction was defective in form, at least; but that there was no difficulty in understanding from the affidavits that it was for an offence against the Canada Temperance Act, within the jurisdiction of the magistrate; that there was evidence before him to prove the offence charged; that no greater penalty was imposed on the defendant than was authorized by the Act; and therefore that if the conviction were before the Court, it would be the duty of the Court to amend it, having regard to the provisions of s. 87 of the Summary Convictions Act, R. S. C. c. 178.

Regina v. *Rose*, 22 N.B. Reps. 309, distinguished.

The Court granted a rule absolute for a *certiorari* to remove the conviction for the purpose of amending it.

Pugsley, Q.C., for the applicant.

L. A. Currey, contra.

NEWFOUNDLAND.

In the Supreme Court.

[26TH JANUARY, 1892.

POWER v. HUNT.

Justice of the peace—Jurisdiction—Municipal corporations—Streets -C. S. c. 80, ss. 15, 28—Appeal.

The defendant was the owner of lands in Duckworth street. The Act C. S. c. 80, s. 15, requires that the owner of a house in Duckworth street must cover the path in front thereof with a stone or plank pavement. Upon a complaint before a magistrate for non-compliance with the terms of the Act, the defendant pleaded in effect that she was not "the owner of the house" and thus not guilty of any default, and that the magistrate had not jurisdiction. Upon the second plea the magistrate dismissed the complaint, holding that the penalty provided by s. 28 had reference only to the offence created by s. 27, and had not reference to a non-compliance with the terms of s. 15. Upon this the complainant appealed.

Held, that the opening words of s. 28 must be read by themselves and not be limited by those which succeeded them in the same section, and that the words so read were sufficiently general to apply to s. 15.

Held, therefore, that the magistrate had jurisdiction.

Morris, for the complainant.

Browning, for the defendant.

[3RD FEBRUARY, 1892.

STEER v. PHILLIPS.

Maritime law—Charter party—Demurrage.

In the year 1887 the defendant chartered the "Rosemary," a schooner belonging to the plaintiff, to carry a cargo of lumber from his mill at Port Lymington to any port or ports not further west than Harbour Briton, calling at St. Johns for orders if

necessary; not to discharge cargo at more than two ports; if third port used, days of shifting from second to third port not to be included in lay days, which were to be ten for discharging; the defendant to have the option of keeping the vessel eight days on demurrage over the lay days at $16 per day.

The vessel called at St. Johns and took on board a supercargo; she proceeded to St. Jacques on the 5th October, and there landed part cargo on the 6th; she sailed for Harbour Briton and landed part cargo; she was detained through stress of weather until the 13th, when she sailed to Grand Bank; she then went to Fortune, where she discharged more. On the 15th she left for Harbour Briton, being forced to do so by reason of the wind and sea. On the 18th she proceeded to Burgeo, where and at Ramea she finished discharging.

The plaintiff claimed for seven days' demurrage.

Held, that the state of the weather of itself did not relieve the charterer from demurrage claim. Judgment was accordingly entered for the plaintiff for $112.

Emerson, Q.C., and *Berteau*, for the plaintiff.

Morison, for the defendant.

[29TH MARCH, 1892.

COADY v. GOVERNMENT OF NEWFOUNDLAND.

Maritime law—Hire of vessel—Contract—Deviation—Liability for loss.

Joseph Coady, a resident of Lamaline, was the owner of the schooner "Annie Lewis." This vessel was on the 23rd November, 1888, hired for the space of 21 days, or for such further period as she was required by the Government, to proceed on the bait protection service. She was equipped and appointed by the plaintiff, by whom also the captain and crew were to be paid, while her movements were under the direction and control of the Government agent placed on board. She was engaged cruising in Placentia Bay for 17 days, when by a telegram from

the Commissioner she was ordered to Harbour Briton in Fortune Bay. After three or four days she was directed to return to Placentia Bay. On the return voyage she was met by tempestuous weather, and in the attempt to shelter in St. Peter's was driven on shore and became a total loss. The agreement for hire was a verbal one. The plaintiff averred that it contemplated a service in Placentia Bay only; that the deviation was without his knowledge and contrary to his instructions; and that the loss was consequent upon it. The defendant Government alleged that the hiring was not for Placentia Bay only, but for Fortune Bay or such other place as she would be required to proceed to in the bait service; that her sailing on Fortune Bay was not objected to by the captain at the time; and that the loss must be attributed to the insufficient equipment of the vessel and want of seamanship and knowledge of the coast on the part of the captain. The claim was for $2,800 for the loss of the vessel and $2,000 for damage resulting therefrom. Upon a petition to the Government subsequent to the action being taken, the plaintiff had been awarded $1,000, but he did not receive such sum in full for his loss.

Held, upon the evidence, that the voyage to Fortune Bay was a deviation; that the loss of the "Annie Lewis" was consequent upon such deviation; that the vessel having been used in a different way from that for which it was hired, the Government was liable for the loss arising while under its control during the deviation.

Judgment was entered accordingly for the plaintiff for $800 and costs.

[12TH APRIL, 1892.

WHITEWAY v. POWER.

Maritime laws—Collision—Damages—Earning power—Registered owner—Beneficial owner.

This was an appeal from the verdict given on the trial before PINSENT, J., and a special jury, the defendant applying to have judgment entered for him or for a new trial. The schooner "William" left St. Johns on the 28th July for Trinity. At nine o'clock, whilst steering a northerly course, the weather being

clear and the wind west, she was struck on the starboard quarter abaft the main rigging stern on by the schooner "P. F." She then sank to the level of the deck. The crew left her and got on board the schooner "P. F." with the intention of returning next morning and taking her to a place of safety in St. Johns. Before they returned, however, she was taken charge of by the "Speedwell." At the time of the collision the "William" had her lights up. There was also a good look-out kept, the master (Best) being at the wheel, and the second hand out of the watch forward. The case of the plaintiff, the owner of the "William," was that the defendant's schooner was first seen from the "William" a quarter mile distant. Their joint speed was about 10 knots; what tack the "P. F." was on could not be discovered, or whether she was coming towards or going away from the "William." She showed so suddenly on the starboard that the "William" luffed to avoid her, that being the only possible thing to do. The "P. F." also luffed and struck the "William," which she would not have done if she had kept her course.

The defendant's case was that although he had been luffing to keep in as close as possible to the land, he had not done so after the plaintiff had sighted his vessel. That the "William" was on his port (sight) side and up till the time that she luffed she showed her port light. That if she had kept her course she would have gone clear but that she luffed up and brought herself across the bows of the "P. F." That by reason of this the collision occured and was in no way due to the absence of lights on board the "P. F."

Upon the hearing the jury expressly found that the defendant was wholly in fault and they assessed the damages at $514, being $414 for damages to the ship and $100 for damages to her earnings for the summer consequential upon the collision.

The Court declined to alter the general verdict, but held that as the plaintiff was the registered owner only, not interested in the result of the voyage, and Seward, who was the beneficial owner and entitled to the earnings of the ship, had not been joined as a co-plaintiff, the sum awarded must be reduced by the $100 given as the earning power of the schooner.

Johnston, for the plaintiff.

Winter, Q.C., for the defendant.

[12TH APRIL, 1892.

HUNT v. HEARN.

Assignments and preferences — Insolvency — Notice to preferred creditor— C. S. c. 90, s. 11.

T. & J. Grace were engaged in St. Johns for four or five years in the business of grocers and dealers in general provisions. In the years 1889 and 1890 they had a contract with the Government for supplying some of the public institutions with goods in their line. They conducted their business during these years by floating notes and other securities, which they negotiated through a bank. They drew upon their credit under their contract with the Government by giving orders on the Board of Works Department, which, on being accepted, were subsequently paid. In August, 1890, a note of theirs, payable at the Union Bank, and held by the defendants, was dishonoured. The defendants, through their solicitor, threatened legal proceedings. Messrs. Grace arrested such actions, which would have affected their credit and prevented their obtaining a renewal of their contract with the Government, by giving to the defendants in December an order upon the Board of Works for $488.90, being the amount of their dishonoured note, $150, and of a note which then was falling due of $338.90. This order was accepted by the Board of Works and was subsequently paid. Other orders which had been so drawn about the same time were not accepted, the Board alleging that they wished to secure themselves primarily. In January, 1891, upon a petition of insolvency, which was afterwards followed by a declaration, the plaintiff was appointed trustee of the estate of T. & J. Grace. The amount of the liabilities proved to be about $12,000 and of the assets $1,500. Of this latter sum, $459 was paid to the trustee by the Board of Works as the balance due. The trustee by this action sought to add $488.90 to the assets, contending that the granting of the order and its subsequent payment was a preferential payment under C. S. c. 90, s. 11. The evidence for the defendants proved that they had not knowledge at the time of taking the order that Messrs. Grace were insolvent; that, on the other hand, they had seen a statement in the Union Bank shewing their assets to be in excess of their liabilities by $8,000; and that upon this statement they gave the credit referred to.

Held, that, under the circumstances, though the payment was made "within two months prior to the declared insolvency," it was not made with a view to give an undue preference to the defendant creditors," and that they "had not notice nor were they aware of the insolvency."

Judgment was accordingly entered for the defendants.

Winter, Q.C., and *Horwood*, for the plaintiff.

Morris, for the defendants.

[19TH APRIL, 1892.

WALSH v. SCANLON.

Partnership—Dissolution—Account—Mining venture—Contract.

The plaintiff and defendant both resided at Brigus at a time when much interest had been excited there by the discovery of gold-bearing quartz in the neighbourhood. In the spring of 1885 the defendant, being interested with two others in tracts situate at Porte de Grave and Burnt Head, proposed to the plaintiff to become interested with him in these mining locations. An agreement was accordingly come to by which the plaintiff was to put into the undertaking $400 and to take one-half dividend. The agreement was not reduced to writing, nor was there any person present during the negotiations of the share of the defendant. The plaintiff actually paid $300, but the remaining $100 was not paid. Mining operations by way of blasting, shaft-sinking, testing, and crushing were subsequently entered upon and a large amount of money expended. The enterprise was eventually abandoned and represented a total loss. The licenses lapsed or became forfeited. The plaintiff was a witness to all the work and was doubtless aware of the general result. The plaintiff contended that the agreement constituted a partnership. By his action he claimed an account of the expenditure of the $300 paid by him, and of the result of the speculation, and a dissolution of partnership. The defendant denied the partnership, contending that the transac-

tion constituted a sale of half his share and thus gave the plaintiff a distinct interest in the enterprise. He claimed from the plaintiff $100 still unpaid.

On the 31st July, 1888, the plaintiff, by his solicitor, had given notice to the defendant of a dissolution of any partnership between them. But he did not ask for any account until the defendant became urgent for the balance of $100.

Both parties were fully examined and gave contradictory accounts of the same transaction. There were no other witnesses.

The Court refused an order for an account, considering that the amount contributed by the plaintiff had been fully and honestly expended upon the adventure. They further refused a decree of dissolution, considering that if there had been a partnership, it was sufficiently dissolved by the notice of 31st July, 1888. They held also that the defendant, having suffered all the properties to lapse and being unable to execute a conveyance, had no further claim upon the plaintiff. The petition was accordingly dismissed and each party ordered to pay his own costs.

[26TH APRIL, 1892.

In re SIMPSON AND THE GOVERNMENT OF NEWFOUNDLAND.

Arbitration and award—Dredging contract—Appeal from award—Jurisdiction—Reviewing award on evidence.

J. E. Simpson & Co. were the contractors with the Government for the construction and equipment of the dry dock in St. Johns. After its completion they became its lessees. The lease by which it was demised to them contained a clause requiring that "the Government should keep the channel from and between the piers of the dock unto the waters of the harbour free and clear for the use of ships so as to afford them safe and expeditious access, ingress, or egress to or from the dock." In December, 1887, they gave notice to the Government of the

blocking of the channel. Thereupon ensued a correspondence which resulted on the 4th March, 1889, in the acceptance by the Government of the offer of Simpson & Co. "to do the necessary dredging at eighty cents per cubic yard, the material to be measured in the scows." When the work was completed to their satisfaction they furnished their account, making claim for the sum of $42,220, for 52,775 cubic yards of material dredged. This sum the Government considered excessive and refused to pay. Recourse was afterwards had to arbitration, each of the parties appointing one arbitrator and the two arbitrators agreeing on a third. The submission was made on the 25th March, 1891, without restriction, the arbitrators, or any two of them, having power to decide upon the claim and all matters in connection therewith, including the arbitrators' fees and the matter of payment. Nineteen sittings were held between the 9th July and the 22nd September, when witnesses were examined and their evidence reduced to writing by a competent reporter. On the 13th October two of the arbitrators made an award of $20,000 in full for dredging, deciding in addition that the parties should pay their own costs. The arbitrator appointed by Simpson & Co. did not join in this award.

From this award Simpson & Co. appealed upon grounds set forth in an affidavit of their counsel. This was met by a counter affidavit.

Held, that, as there was no allegation of excess in jurisdiction, as the jurisdiction conferred had been exercised, and the award was good on the face of it, the Court would not constitute itself a Court of review of the evidence or go into the merits of the case.

The appeal was therefore dismissed.

[3RD MAY, 1892.

RICHARDS v. JOB.

Fisheries—Sunday sealing—Refusal of part of crew to work on Sundays—Right to share in proceeds—Disobedience to lawful commands—Contract.

The defendants were owners and captain respectively of the sealing steamer "Nimrod." This steamer proceeded to the ice in March, 1892, at the usual time, having on board 167 men. The agreement usual in such cases was entered into, whereby it

was provided *inter alia* that "the crew shall exert themselves for the good of the voyage and shall at all times be obedient to the lawful commands of the master at sea, on shore, or on the ice; and should any man neglect or be found incompetent for the due performance of his duty in any respect, he shall only be entitled to such share of the proceeds of the voyage as the master may deem fit to apportion him"; also, "if any of the crew refuse to obey the lawful commands of the master, he shall not be entitled to claim any share of the season's seals or any other compensation"; and "being fully and faithfully performed without hindrance or neglect, each man is to receive his share of the value of one-third of the seals brought in and delivered in this port (St. Johns), being the catch of the said crew."

The steamer was in the seals on Sunday the 13th and Sunday the 27th March. As many as 3,000 seals were taken upon these days. The plaintiff Richards and 34 others refused to work upon these days, but they were engaged on the Mondays in cleaning out the steamer for their reception, in getting the seals on board, and storing them away. When the plaintiff was being paid off he was offered an amount less than the sum given to each of the 132 men who worked upon the Sundays. He brought action claiming his full share in the one-third proceeds of the voyage, contending that the captain had no right to place his share at a less sum than the others; that in the conduct of the seal fishery no distinction was made between one day's catch and another's, by weight or otherwise, no credit given to the individual men or particular body of men for the actual seals they killed and hauled, but all the seals were thrown together in the hold without respect to quality, and at the close of the voyage the men shared alike in the one-third proceeds. That if Sunday's seals were to be distinguished from those taken on other days, not only ought they to be kept apart and credit given to the takers for their weight and value of skin, but the principle ought to be extended further and each man's catch credited to him and an individual account opened. That the seal fishery as now conducted was necessarily a *quasi* partnership between the men. The defendants contended that the refusal to work upon Sundays was a refusal to obey a lawful order, and that under the agreement the captain was empowered to award such share as he pleased to the men disobeying; that further the captain had been liberal in the exercise of this power.

Held, that the refusal to work upon Sundays was an act of disobedience to a lawful command, and therefore the captain was empowered to award to such men such share as seemed well to him. The appeal was accordingly dismissed.

Browning, for the appellant.

Morison, for the defendant.

[31ST MAY, 1892.

PARSONS v. RYAN.

Mortgagor and mortgagee—Sale under power in mortgage—Default—Setting aside—Redemption—Costs.

The plaintiff was the owner of certain lands named Cherry Hill near St. Johns. On the 13th June, 1882, he gave a mortgage upon these to the defendant Ryan in consideration of $800 repayable at the expiration of three, five, or seven years from the above date, with interest in the meantime at the rate of seven per cent. per annum, half-yearly on the 15th December and June in each year, with covenant for repayment of principal together with interest at the aforesaid times; the plaintiff mortgagor to remain in quiet possession until default in payment of principal or interest; also with a power to sell either at public auction or private sale after two months' notice in writing on default in the payment of the said *principal sum with interest* thereon as aforesaid, freed from all equity of redemption, etc. The interest was paid up to June, 1885, after which default in its payment was continually being made. On the 26th October, 1887, notice was given by the defendant claiming interest and giving notice of sale. On the 15th June, 1888, a similar notice was given. This resulted in an arrangement between the parties whereby it was agreed that the plaintiff should be given time till the 1st September, and would then pay $200 upon the interest due and the premium of insurance paid by the defendant Ryan. In default of payment he would on demand and after thirty days surrender up the premises and thereupon the premises should be sold by the defendant Ryan, the mortgagee, at public auction under the power of the deed. On 8th September, the amount not having been paid, notice was given that if payment was not made within thirty days, legal proceed-

ings would be taken. On 3rd July, 1889, notice was given that the matter had been placed in the hands of an auctioneer, who would proceed to sell. On the 4th an advertisement appeared by Spry, the auctioneer, stating that the lands would be sold at public auction at this office, without stating where situate, on the 11th July. The plaintiff complained that the property was misdescribed as containing 7 to 12, whereas it contained 12 acres. On the 8th July the plaintiff enclosed $80 in a note to the defendant's solicitor, offering $200 additional in two payments before the close of the month. The money so enclosed was returned. On the 11th the premises were offered for sale. The highest bid was $1,800. The sale did not therefore take place. Some days afterwards the defendant Ryan sold the house to the defendant Dooley for $2,000, the latter signing conditions of sale as if made at an auction. In August the defendant Ryan took proceedings in ejectment against the plaintiff, which the latter confessed in the November term with a stay of execution. In November the plaintiff tendered certain moneys in payment of interest and insurance premiums to Ryan's solicitor, which he would not accept. There was a sum of $84 paid to Ryan himself about this time for interest due in 1885. During these proceedings there was no mention made of the sale to the defendant Dooley. No formal notice was given to the plaintiff, the only information he had being derived from rumour. There was no deed of the sale under mortgage. In January, 1890, when the defendant Ryan was leaving St. Johns upon a visit to England, he signed a bill of sale of the land and delivered it as an escrow. On the 18th February, 1890, the plaintiff filed a bill of complaint against the defendant Ryan, as mortgagee, for redemption upon the payment of principal and interest. To this the defendant filed his defence on the 1st March, and thereupon leave was given to the plaintiff to amend his bill, it appearing, and now for the first time formally, that the land had been sold to Dooley. An amended bill was then filed against the defendants Ryan and Dooley, setting forth the facts as above stated and praying that Ryan be restrained from executing his writ of *hab. fac.* and decreed to execute a release of mortgage or assignment upon being paid principal, interest, and costs, upon the common law side, and that the sale or agreement to sell to Dooley be declared fraudulent and be set aside.

The defendants answered separately, Ryan setting forth circumstances and contending that under these the plaintiff had

lost his right to redeem, and that the sale was *bona fide*, and praying that the bill be dismissed. He submitted that if the Court thought otherwise, he ought not to be compelled to assign to third parties but merely to release the mortgage and that the plaintiff should, as a condition precedent, pay all costs and expenses incurred. The defendant Dooley prayed that the bill be dismissed against him with costs.

Issue being so joined, the plaintiff upon the motion of Ryan's solicitor paid into Court the principal and interest and such costs as were then ordered by the Court.

Held, that the power of sale in the mortgage deed in question required two months' notice after default made in payment of principal with interest; that this would not have occurred until 15th June, 1889; that the notice given 26th October, 1887, was prior to the default, and was inoperative. That, further, the agreement of 23rd June, 1888, was that which was binding on the parties, both as to the time and mode of conducting the sale upon default, namely, by public auction, and that the sale to Dooley was not in conformance with the agreement in this respect and could not be maintained.

Held, thereupon, that the plaintiff was entitled to redeem under the usual redemption clause; that Ryan was not compelled to assign to a third party, but must release the estate in him as mortgagee, and should pay the costs from the time of payment into Court, as he should not then have opposed the prayer of the bill; and that Dooley should pay costs from the time of filing and service of the bill, as he should have known that he was not released from responsibility as to the antecedents of the sale, and was not justified in endeavouring to maintain an unauthorized sale and purchase.

[14TH JUNE, 1892.

SHEA v. GOVERNMENT OF NEWFOUNDLAND.

Contract—Loan negotiations—Commission—Evidence.

In October, 1886, the plaintiff was engaged by the defendant Government as a delegate to advocate the confirmation of the Bait Act by the Imperial Government. For his travelling expenses he was to receive £125 stg. He further, before leaving, received

verbal instructions for the purpose of raising a temporary loan for the use of the colony upon executive responsibility, to form part of a contemplated permanent loan. During his visit to England upon the Bait Act, and acting under his instructions, he negotiated a loan of £75,000 stg. In April following he again went to England upon the second Bait Act, and this time acted in conjunction with the Premier, Sir Robert Thorburn. While in England they both represented the colony at the Colonial Conference held that year. For such services they received $1,200, and the additional sum of £500 stg. when attendance upon the Conference was associated with their duties. Again upon this visit the plaintiff's services were enlisted in obtaining from the London and Westminster Bank a temporary loan of £25,000, making in all £100,000. A short time after this he was appointed to the Governorship of the Bahamas. For the obtaining of this loan he claimed as commission £500 stg., being at the rate of one-half per cent. upon the sum secured.

The evidence showed that the question of remuneration formed no part of the negotiations. The permanent loan of which the temporary formed a part was afterwards effected by the Premier without any charge beyond the amount of his passage money from England. Both he and the Colonial Secretary stated that the plaintiff appeared satisfied with the sums paid him. He returned from the first delegation and made no further claim on account of the mission. He proceeded upon a second, and upon his return made no charge for the particular service discharged. He made no claim until March, 1888, when he had left this country to reside in Nassau.

Held, that the amounts received must be taken to have been accepted by the plaintiff as a full compensation for his services, and that therefore he had no further claim.

Kent, Q.C., for the plaintiff.

Whiteway, Q.C., for the defendants.

[15TH JUNE, 1892.

DAVIDSON v. DESBARRES.

Landlord and tenant—Covenant for title—Breach.

The defendant was the owner of a dwelling-house, shop, and premises situate in Water street in St. Johns. Of these premises one Duchmin was the lessee for the term of 15 years still to run

at the time of this action, at the rental of $360 per annum. The plaintiff was sub-lessee of the shop, being the tenant under Duchmin at the rental of $580 upon a term unexpired of twelve years. The defendant, believing he would be in a position to eject Duchmin by the first of November, 1889, undertook to give, and the plaintiff, being under the same belief, to accept, a lease of the above premises for a term of thirty years commencing from the 1st day of November, 1889, at the annual rent of $480. The defendant covenanted that he had full power and lawful authority to demise. He also covenanted for quiet enjoyment. The plaintiff failed to eject Duchmin and was consequently unable to give to plaintiff possession of the dwelling-house. As tenant of Duchmin, the plaintiff continued in possession of the shop.

The plaintiff sued for a breach of these covenants by the defendant. He alleged (1) that the defendant had no authority to make the demise; (2) that the defendant had given a prior lease of the property to one Duchmin, who entered upon it and ejected the plaintiff.

The defendant pleaded that the plaintiff was not evicted and as to the breach of covenant for title to demise, paid into Court one dollar.

Held, that the plaintiff, never having entered into possession of the dwelling-house, and continuing in possession of the shop, had not been evicted; and that, looking at the relations of the plaintiff, defendant, and Duchmin, and that the two former in granting and accepting a lease were speculating in concert upon the probability of Duchmin losing the property, the action was not a meritorious one, and justice would be met by giving judgment for the plaintiff for $50 and the general costs of the cause.

Kent, Q.C., for the plaintiff.

Winter, Q.C., for the defendant.

PITTS v. O'DWYER.

Costs — Judicature Act, s. 91 — "Event" — Several issues — Distributive judgment.

In this cause the plaintiff in his statement of claim charged the defendants in trespass for wrongfully seizing his vessel; and, secondly, in trover for unlawfully seizing, taking, and converting his goods; and, thirdly, sought the recovery of $400 alleged to

have been wrongfully obtained from him. The damages were laid at $3,270. The jury found for the plaintiff on the third count or claim for $400, and in favour of the defendants on the two claims in trespass and trover. Under these circumstances, the plaintiff's counsel contended that he was entitled to have the general costs of the cause, and the entering up of judgment therein.

The matter for determination was one entirely subject to the terms or provisions of the Judicature Act, s. 91, and their application and meaning.

Held, that the word "event" is to be read distributively; that the finding on one issue having been in favour of the plaintiff, he was entitled to the general costs necessarily incurred by him in support of that issue; that the findings on the two issues having been in favour of the defendants, they were similarly entitled to the costs necessarily incurred by them in support of such issues; and that judgment when entered must be entered distributively.

[15TH JULY, 1892.

HARVEY v. HUNT.

Mortgage—Guarantee—Right to foreclose.

In the month of June, 1886, Robert Barnes and Jessie Barnes, trading under the firm name of Barnes & Co., assigned certain lands, chattels, and shares described in the conveyance and "in the documents accompanying the indenture" unto the plaintiffs, trading as Harvey & Co., "to hold to them for the space of three years from the date hereof or so long as the credit of the Union Bank shall be continued in force." The assignment was expressed to have been made "for and in consideration of a credit having been established at the Union Bank of this city by the aforesaid Harvey & Co. for the aforesaid Barnes & Co." The deed was duly registered. The first guarantee to the bank was given "for six months" for £1,000 stg., and was renewed from time to time up till August, 1889, when Mr. Harvey, referring to Robert Barnes, wrote to the bank:—"I will ask you to let him

overdraw for the present as during past month or two, and I will be responsible for repayment of principal and interest." In March, 1891, Robert and Jessie Barnes assigned their estate and effects to the defendant as trustee for the benefit of creditors. The plaintiffs acknowledged that at this time they were guarantors to the bank for the £1,000 stg., equal to $4,800, which sum had been overdrawn by Barnes & Co., and claimed that an account be taken, and on failure of the sum found to be due to them by Barnes & Co., that the mortgage be foreclosed.

The defendant claimed that the plaintiffs were not liable to the bank as guarantors; that the credit was not in force; and that the alleged mortgage was in its terms ineffectual at the present date as a conveyance by way of security to the plaintiffs. He contended that its only effect was to convey an interest in the various properties for the term of three years, and that this period had expired.

Held, that, notwithstanding the extraordinary nature of the conveyance, the evident intention of the document was to secure the plaintiffs, not for a term of three years only, but for such period as the guarantee should continue; that, therefore, the properties so conveyed could not be redeemed until the liability under the guarantee was discharged; and that, if necessary, an account should be taken of the amount which the plaintiffs had paid or to which they might be liable under the credit which they had established for Barnes & Co. at the Union Bank.

Judgment was given for the plaintiffs without costs.

Whiteway, A.-G., for the plaintiffs.

Winter, Q.C., for the defendants.

Supreme Court of Canada.

ONTARIO.] [10TH OCTOBER, 1892.

McDOUGALL v. CAMERON.
BICKFORD v. CAMERON.

Solicitor—Action for costs—Set-off—Mutuality—Appeal—Jurisdiction.

A firm of solicitors brought an action against certain clients on a bill of costs, to which action it was sought to set off a sum of money received by one of the solicitors from one of the clients for special services. The taxing officer allowed the set-off, but his decision was reversed on appeal.

Held, affirming the judgment of the Court of Appeal for Ontario, that, assuming the Court had jurisdiction to entertain the appeal, which was doubtful, the client was not entitled to set off, in an action against a firm, a sum paid to one of the members, the debts not being mutual; moreover, the money being paid to one of the solicitors for special services and not for services covered by the retainer to the firm, it could not be set off.

Held, per TASCHEREAU, J., that the appeal was not from a final judgment within the meaning of the Supreme Court Act, and there was no jurisdiction to entertain it.

W. R. Riddell and *W. Nesbitt*, for the appellants.

Ritchie, Q.C., for the respondents.

WESTERN ASSURANCE CO. v. ONTARIO COAL CO.

Marine insurance—General average—Insurance on hull—Abandonment—Attempt to save vessel and cargo—Expense incurred—Liability of cargo to contribute—Average bond.

A schooner loaded with coal was stranded in Humber bay, near Toronto, and abandoned. The hull was insured but not the cargo, and notice of abandonment was given to the underwriters, who secured the services of an experienced wrecker and

a wrecking expedition and attempted to save the vessel. It was considered advisable, and the best course in the interest of the owners of the cargo as well as the underwriters, to attempt to save the vessel and cargo together. Owing to stress of weather, operations could not be begun for some days after the expedition was ready, and when the wreckers got to work a portion of the coal was taken out and attempts made to save the vessel, but without success, and she had to be abandoned. Before any of the cargo was delivered, the owners and the underwriters executed an average bond, by which, after a recital of the loss of the schooner, they respectively bound themselves to pay the losses and expenses incurred according to their respective shares in the vessel, her earnings as freight, and her cargo, and that such losses and expenses should be stated and apportioned in accordance with the established laws and usage of the Province in similar cases by a named adjuster.

The adjuster apportioned the loss between the underwriters as owners of the material saved and the owners of the cargo, making the amount due from the latter $2,814, and an action was brought against them on the average bond to recover the same. The sum of $557 was paid into Court and liability beyond that amount was denied.

Held, affirming the judgment of the Court of Appeal, 19 A. R. 41, of the Queen's Bench Division, 20 O. R. 295, and of BOYD, C., 19 O. R. 462, that the average bond only obliged the owners of the cargo to pay what should be legally due according to the law of general average; that the cargo and vessel were never in that common peril which gives the right to claim for general average; and that the sum paid into Court was sufficient to cover the cost which would have been incurred in saving the cargo by itself, and the underwriters were not entitled to recover more.

Osler, Q.C., and *Chrysler*, Q.C., for the appellants.

Delamere, Q.C., for the respondents.

QUEBEC.] [6TH OCTOBER, 1892.

TREMBLAY v. BERNIER.

Notarial code—R. S. Q. Art. 3871—Board of notaries—Disciplinary powers—Prohibition.

Where a charge derogatory to the honour of the profession of notary is made against a notary under the provisions of the notarial code, R. S. Q. Art. 3871, which amounts to a crime or felony, the board of notaries has jurisdiction to investigate it without waiting for the sentence of a Court of criminal jurisdiction.

The appeal was dismissed with costs.

Belcourt, Q.C., for the appellant.

Fremont and *Languedoc*, for the respondents.

[10TH OCTOBER, 1892.

O'SHAUGNESSY v. BALL.

Replevin—36 V. c. 81 (P.Q.)—Booms—Proprietary rights—Estoppel by conduct.

O'S., claiming to be the legal depositary, and T. McC., claiming to be the usufructuary, of certain booms, chains, and anchors in the Nicolet river, under 36 V. c. 81 (P. Q.), which G. B., being in possession of the same for several years under certain deeds and agreements from T. McC., had stored in a shed for the winter, brought an action *en revendication* to replevy the same, and for $5,000 damages.

Held, affirming the judgment of the Court below, that O'S. and T. McC. were not entitled to the possession as alleged, and that they were precluded by their conduct and acquiescence from disturbing the possession of G. B. See *Ball* v. *McCaffrey*, 20 S. C. R. 317.

BAPTIST v. BAPTIST.

Appeal—Final judgment—Action en reprise d'instance—Art. 439, C.C.P.—R.S.C c. 135, ss. 2, 24, 28.

The plaintiff in an action brought to set aside a deed of assignment died before the case was ready for judgment, and the respondent having petitioned to be allowed to continue the suit as legatee of the plaintiff under a will dated the 17th November, 1869, the appellant contested the continuance on the ground that this will had been revoked by a later will, dated 17th January, 1885. The respondent replied that this last will was null and void, and upon that issue the Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court, declared null and void the will of 17th January, 1885, and held the continuance of the original suit by the respondent to be admitted. On appeal to the Supreme Court the respondent moved to quash the appeal, on the ground that the judgment appealed from was an interlocutory judgment.

Held, that the judgment was *res judicata* between the parties and final on the petition for the continuance of the suit, and therefore appealable to this Court: R. S. C. c. 135, ss. 2 and 28.

Shaw v. *St. Louis*, 8 S. C. R. 885, followed.

Lafleur, for the motion.

Stuart, Q.C., contra.

PARADIS v. BOSSE.

Solicitor and client—Costs of proceedings before Exchequer and Supreme Courts of Canada—Quantum meruit—Parol evidence—Art. 3597, R.S.Q.

In proceedings before the Exchequer and Supreme Courts, there being no tariff as between attorney and client, an attorney has the right to establish the quantum meruit of his services by oral evidence in an action for his costs.

The appeal was dismissed with costs.

Belcourt and *Mackay*, for the appellant.

Casgrain, Q.C., for the respondent.

EMERALD PHOSPHATE CO. v. ANGLO-CONTINENTAL GUANO CO.

Appeal—Jurisdiction—Future rights—Title to land—Mining lands—Bornage —Injunction—R. S. C. c. 139, s. 29 (b).

In case of a dispute between adjoining proprietors of mining lands, where an encroachment is complained of and it appears that the limits of the respective properties have not been legally determined by a bornage, the Court of Queen's Bench (appeal side) held that an injunction would not lie to prevent the alleged encroachment, the proper remedy being an action *en bornage*.

On appeal to the Supreme Court of Canada :—

Held, that as the matter in controversy did not put in issue any title to land where the rights in future might be bound, the case was not appealable : R. S. C. c. 139, s. 29 (*b*).

The appeal was quashed with costs.

Laflamme, Q.C., and *Cross*, for the appellant.

McCarthy, Q.C., and *Foran*, for the respondent.

[2ND NOVEMBER, 1892.

In re RICHELIEU DOMINION ELECTION.

Election petition—Status of petitioner—Preliminary objection—Lists of voters—Dominion Elections Act, R. S. C. c. 8, ss. 30 (b), 31, 33, 41, 54, 58, 65—The Electoral Franchise Act, R. S. C. c. 5, s. 32.

Held, affirming the decision of GILL, J., that where the petitioner's status in an election petition is objected to by preliminary objection, the evidence of his being entitled to petition against the return of the respondent being susceptible of easy proof by the production of the voters' list actually used or a copy thereof certified by the clerk in Chancery (R. S. C. c. 8, ss. 41, 58, and 65 ; R. S. C. c. 5, s. 52), the production at the enquête of a copy certified by the revising officer of the list of voters upon which his name appears, but which has not been compared with the voters' list actually used at the election, is insufficient proof ; GWYNNE and PATTERSON, JJ., dissenting.

Morgan and *Gemmill*, for the appellant.

Belcourt and *Plamondon*, for the respondent.

[3RD NOVEMBER, 1892.

COUTURE v. BOUCHARD.

Appeal—Supreme and Exchequer Courts amending Act, 1891—54 & 55 V. c. 25, s. 3—Appeal from Court of Review—Case standing over for judgmenl—Amount necessary for right of appeal—Arts. 1178 and 1178 (a), C. C. P.

The action in this cause was for $2,006, and the case was argued and taken *en delibere* by the Superior Court sitting in review on the 30th September, 1891, the day on which the Act 54 & 55 V. c. 25, s. 3, giving a right of appeal from the Superior Court in review to the Supreme Court of Canada, was sanctioned, and the judgment appealed from was rendered a month later. On appeal to the Supreme Court of Canada:—

Held, per STRONG, FOURNIER, and TASCHEREAU, JJ., that the respondent's right could not be prejudiced by the delay of the Court, and under the ruling of *Hurtubise* v. *Desmarteau*, 19 S. C. R. 562, the case was not appealable.

Per GWYNNE and PATTERSON, JJ., that the case did not come within the words of 54 & 55 V. c. 25, s. 3, inasmuch as the judgment, being for less than £500 sterling, was not a judgment from which the appellant had a right of appeal to the Privy Council in England: Arts. 1178 and 1178 (*a*), C. C. P.

T. C. Casgrain, Q.C., for the motion to quash.

Pelletier, contra.

NOVA SCOTIA.] [10TH OCTOBER, 1892.

BRITISH AMERICA ASSURANCE CO. v. LAW.

Marine insurance—Insurable interest—Insurance on advances—Construction of policy.

A policy of marine insurance on the barque "Lizzie Perry" was issued by the British America Assurance Co. to W. L. & Co., managing owners of the vessel. The first part of the policy read as follows: "L. & Co., on account of owners; loss, if any, payable to L. & Co.; do make insurance and cause to be insured, lost or not lost, the sum of $2,000 on advances upon the body, tackle," etc. The policy was on a printed form but the words "on advances" were inserted in writing. The remainder of the instrument was applicable to insurance on a ship only.

To an action on this policy the defence was that it only insured advances by the owners, which were not a proper subject of insurance, and the policy was, therefore, void. It was shown that L. & Co. had expended a considerable sum of money in repairs on the vessel.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that the rule *ut res magis valeat quam pereat* required the policy to be construed, if possible, so as to make it a valid instrument, and this could be done either by striking out the words "on advances" as mere surplusage, or treating them as being a mere immaterial reference to the inducement which led the owners to insure the ship.

Henry, Q.C., for the appellants.

Borden, Q.C., for the respondents.

CHANDLER ELECTRIC CO. v. FULLER.

Negligence—Manufacture of electricity—Discharge of steam—Damage to adjoining property.

F. was owner of a warehouse in the city of Halifax used for storing iron, and had occupied the same for some twenty years. In 1889 an electric company established a station for generating electricity on the adjoining premises. Attached to the engine used by the company in their business was a condenser, which passed through the floor of their premises and discharged into the dock below, at a distance of some twenty feet from the warehouse. In March, 1889, the warehouse was found to be full of steam, which fact was communicated to the officers of the company, who stated that they could not understand how it could have been caused by their engine. The steam continued to enter the warehouse, injuring the iron therein, and in 1890 an action was commenced by F. against the company for such damage. The company contended, as a defence to the action that they were using the latest and best improvements in machinery for their business, and that they operated the same in a proper manner and without negligence; that the injury, if

caused by their engine, was due to the defective state of the plaintiff's premises; and that they were acting in pursuance of statutory powers contained in their Act of incorporation, and were therefore exempt from liability. At the trial judgment was given against the company, and on appeal to the full Court the Judges were equally divided.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that the act causing the injury violated the rule which does not permit a person, even on his own land, to do an act which, lawful in itself, yet necessarily causes injury to another; and, especially as the injury continued after notice to the company, the plaintiffs were entitled to recover damages therefor.

F. H. Bell, for the appellants.

Newcombe, for the respondents.

CROWE v. ADAMS.

Sheriff—Action against—Trespass or trover for seizing goods—Justification—Necessity to show judgment—Title to goods—Married Woman's Property Act, R. S. N. S., 5th ser., c. 74.

A sheriff having seized goods under execution against Donald A., the wife of the execution debtor brought an action against him for trespass by such seizure, alleging that the goods seized were her separate property under the Married Woman's Property Act, R. S. N. S., 5th ser., c. 74, and claiming also that the execution was void, as her husband's name was Daniel, and not Donald. On the trial the sheriff, under his plea of justification, put in evidence the writ of execution, but did not prove the judgment on which it issued. The jury found that the plaintiff's right to the goods seized, whatever it was, was acquired from her husband, after marriage, which would not make it her separate property under the Act; they also found that the husband was well known by both names of Daniel and Donald. The trial Judge held that the plea of justification was not proved by the production of the execution, but that proof of the judgment was necessary, and he gave judgment for the plaintiff, which was affirmed by the full Court.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that the action could not be maintained; that a sheriff sued in trespass and trover for taking or converting goods seized under execution, can justify under the execution without showing the judgment: *Hannon* v. *McLean*, 8 S. C. R. 706, followed; and that by the findings of the jury the goods seized must be considered to belong to the husband, which was a complete answer to the action.

Newcombe, for the appellant.

Borden, Q.C., for the respondent.

SMITH v. McLEAN.

Bill of sale—Affidavit of bona fides—Adherence to statutory form—Description of deponent—R. S. N. S., 5th ser., c. 92, ss. 4, 11.

By R. S. N. S., 5th ser., c. 92, s. 4, every bill of sale executed in Nova Scotia must be accompanied by an affidavit by the grantor that it is given in good faith, etc., and by s. 11 such affidavit shall be, as nearly as may be, in the form given in the schedule to the Act. The prescribed form begins as follows:—"I, A. B., of in the county of (occupation) make oath and say." In an affidavit accompanying a bill of sale under this Act, the occupation of the deponent was not stated.

Held, *per* STRONG, GWYNNE, and PATTERSON, JJ., that as the affidavit referred in terms to the bill of sale itself, in which the occupation of the grantor was mentioned, the statute was complied with and the instrument was valid.

Per TASCHEREAU, J.—The *onus* was on the persons attacking the bill of sale to prove, by direct evidence, that the deponent had no occupation, which they had failed to do.

The judgment of the Supreme Court of Nova Scotia was reversed.

Whitman, for the appellants.

Silver, for the respondent.

NEW BRUNSWICK.]

VAUGHAN v. RICHARDSON.

Marine insurance—Charter party—Disbursements—Difference in freight—Guarantee of part owner—Consideration—Misrepresentation—Pleading—Evidence.

V., part owner and managing owner of the ship "Eurydice," chartered her to R. for a voyage from Savannah to Liverpool. The charterer was to pay a lump sum for freight, and the master to sign bills of lading at any rate of freight without prejudice to the charter party. If the actual freight exceeded the sum payable by the charter, the master of the ship was to give bills for the difference to R., payable ten days after the arrival of the ship at Liverpool, and the disbursements were to be secured by similar bills. When the ship was loaded it was found that the difference in freight was in favour of R., and by arrangement with the son of V., the managing owner, who held a power of attorney to act as his agent, the master drew two bills of exchange on the agents of the ship at Liverpool, one for the amount of the disbursements and the other for the difference in freight, each in favour of R. and payable sixty days after sight.

The bills were accepted by the agents but were not paid at maturity, and notice of dishonour was given to V., who, on receiving it, sent another of his sons to the solicitors who held the bills for collection. This son stated to the solicitors that his father would like the matter to be held over until he could communicate with the other owners, which was acceded to, and an agreement was drawn up, in the form of a letter to the solicitors, requesting them to delay proceedings on the bill for disbursements until the ship arrived at St. John, N.B., where V. lived, and guaranteeing immediate payment, on her arrival, of that bill with cost of protest, etc., and also of the bill for difference in freight. This agreement was taken to V., who signed it, and it was returned to the solicitors. When the ship arrived V. paid the draft for disbursements but refused to pay the other, on the ground that he had supposed they were both for disbursements, and that the solicitors had so stated to his son when the agreement was prepared. An action was then brought against V. on his guarantee to pay the draft for difference in freight, to which he pleaded that he had been induced to sign the same by fraud and misrepresentation.

On the trial of the action it was proved that the son who acted for V. at Savannah under a power of attorney had at first refused to sanction the drawing of the bill for the difference in freight, but finally agreed to it on receiving a letter stating the circumstances and what the draft was for; which letter, as he stated in giving evidence, he had sent to V., but it was not produced; the son who had called upon the solicitors swore that they had told him that both bills were for disbursements and he had so stated to his father. In this he was contradicted by V. himself, who said in his evidence that his son had told him that the larger bill was for disbursements and the smaller for difference in freight. His counsel contended, on moving against the verdict in favour of R., that he was incapacitated by age and infirmity from giving reliable evidence.

It was admitted by counsel for V. that any misrepresentation made by the solicitors as to the nature of the drafts was an innocent misrepresentation only, and not made with intent to deceive. A verdict was given for the plaintiff, which the full Court sustained.

Held, affirming the judgment of the Supreme Court of New Brunswick, 28 N.B. Reps. 364, that the verdict should stand; that the defence of misrepresentation set up at the trial was not open to the defendant under the plea of fraud, and should have been distinctly pleaded; that no application to amend by adding such plea having been made at the trial, it could not be entertained now, in view of the length of time the case had been in litigation and the delays that had taken place; that even if the defence were available, nothing could be gained by ordering a new trial, as no jury could help finding for the plaintiff under the evidence given by the defendant himself, which would have to be read to the jury, the defendant having died since the trial.

Barker, Q.C., and *Palmer*, Q.C., for the appellants.

Hazen and *Currey*, for the respondents.

BUCK v. KNOWLTON.

Marine insurance—Application to agent—Neglect to forward—Liability of agent for—Privity of contract—Negligence—Trover.

B., wishing to insure his vessel, went to a firm of insurance brokers at St. John, N. B., to whom he gave an application for $800 insurance at eleven per cent. on a valuation of $2,500.

The brokers sent the application by a clerk to K., the agent at St. John for an underwriters' company in Portland, Maine, requesting a policy from his company. K. informed the clerk that he would not forward the application unless the valuation was put at $3,000, or the premium raised to twelve per cent. This was never acceded to by the brokers, and two days after K. forwarded an application to his company, putting the valuation at $3,000, and on the following day the vessel was burnt. The policy was sent to K., but recalled by telegram before it was delivered to B. or to the brokers, and was returned to the company. B. brought an action against K. claiming damages for negligence in not forwarding the application in proper time, with a count in trover for conversion of the policy.

Held, affirming the decision of the Supreme Court of New Brunswick, that, as K. never forwarded, nor undertook to forward, the application signed by the brokers on B.'s behalf, he owed no duty to B., and could not be liable for any negligence.

Held, further, that, as the policy issued never ceased to be the property of the company, and was nothing more than an escrow in the hands of K., no action would lie against K. for its conversion.

Palmer, Q.C., for the appellants.

McLeod, Q.C., for the respondent.

Exchequer Court of Canada.

[BURBIDGE, J., 1ST SEPTEMBER, 1892.

LAVOIE v. REGINAM.

Railways—Liability of Crown as common carrier—Negligence—Regulation for carriage of freight—Notice by publication in Canada Gazette—The Government Railways Act, 1881—The Exchequer Court Act, 50 & 51 V. c. 16, s. 16, construction of.

Apart from statute, the Crown is not liable for the loss or injury to goods or animals carried by a Government railway, occasioned by the negligence of the persons in charge of the train by which such goods or animals are shipped. By virtue of

the several Acts of the Parliament of Canada relating to Government railways and other public works, the Crown is in such a case liable, and a petition of right will lie under the Act 50 & 51 V. c. 16 for the recovery of damages resulting from such loss or injury.

The Queen v. *McLeod*, 8 S. C. R. 1, and *The Queen* v. *McFarlane*, 7 S. C. R. 216, distinguished.

2. The publication in the *Canada Gazette*, in accordance with the provisions of the statute under which they are made, of regulations for the carriage of freight on a Government railway is notice to all persons having occasion to ship goods or animals by such railway.

3. One of the general conditions in the regulations applicable to the carriage of live stock by the Intercolonial Railway is that "all live stock conveyed over the railway are to be loaded and discharged by the owner or his agents, and he undertakes all risk of loss, injury, damage, and other contingencies in loading, unloading, transportation, conveyance, and otherwise, no matter how caused."

By s. 50 of R. S. C. c. 38, under which the regulations were made, it is provided that Her Majesty shall not be relieved from liability by any notice, condition, or declaration in the event of any damage arising from the negligence, omission, or default of any officer, employee, or servant of the Crown.

Held, that the regulations must be read as part of the Act, s. 44, and that the condition did not relieve from liability where the loss or injury was occasioned by the negligence of the Crown's servants.

4. The owner of a horse shipped in a box car the doors of which can only be fastened from the outside, and who is inside of the car with the horse, has a right to expect that the conductor of the train will see that the door of the car is closed and properly fastened before the train is started.

MURPHY v. REGINAM.

Sale of ordnance lands in Quebec—Cancellation—23 V. c. 2, s. 20.

In the year 1876 the suppliant purchased a number of lots at an auction sale of ordnance lands in the city of Quebec. He paid certain instalments and interest thereon, amounting in all to $2,447.92. Being unable to complete the payments for which

he was liable, he applied to the Crown in 1885 to appropriate the money paid by him to the purchase of three particular lots—Nos. 19, 38, and 39. This the Crown consented to do, and upon an adjustment of the account there was found to be a sum of $73.92 due to the suppliant, which, by mutual arrangement, was appropriated to the purchase of another lot, No. 100, leaving a balance then due to the Crown of $126.08. When, however, the suppliant came to pay this balance and get his patents for the four lots, he was informed that lot 19 would probably be required for certain military purposes. He then tendered the balance due to the proper officer of the Crown in that behalf, but it was declined. Patents for lots 38, 39, and 100 were subsequently issued to the suppliant, and nothing further was done until 1886, when the Crown resumed possession of lot 19, which was followed up by an attempted cancellation of the sale of the lot under 23 V. c. 2, on the ground that, as the balance due on the purchase had not been paid, the terms and conditions of sale had not been complied with.

Held, that the sale was not duly cancelled; that the suppliant had forfeited none of his rights under it, and was entitled to damages equal to the value of the lot at the time the Crown resumed possession thereof.

Quære—Has the Deputy Minister of the Interior the right to exercise the powers of cancellation vested in the Commissioner of Crown Lands by s. 20 of the Act of the Province of Canada 23 V. c. 2?

DE KUYPER v. VAN DULKEN.

Trade-mark—Rectification of register—Jurisdiction of Exchequer Court—54 & 55 V. c. 26—54 & 55 V. c. 35.

The Court has jurisdiction to rectify the register of trade-marks in respect of entries made therein without sufficient cause either before or subsequent to the 10th July, 1891, the date on which the Act 54 & 55 V. c. 35 came into force.

Quære—Has the Court jurisdiction to give relief for the infringement of a trade-mark where the cause of action arose out of acts done prior to the passage of the Act 54 & 55 V. c. 26?

MARTIAL v. REGINAM.

Tort—Injury to the person on a public work—Remedy—Prescription, interruption of—C. C. L. C. Art. 2227—50 & 51 V. c. 16.

The suppliant, who was employed as a mason upon the Chambly canal, a public work, was injured through the negligence of a fellow servant. Subsequent to the accident the Crown retained the suppliant in its employ as a watchman on the canal, and indemnified him for expenses incurred for medical attendance.

Held, that what was done was referable to the grace and bounty of the Crown and did not constitute such an acknowledgment of a right of action as would, under Art. 2227, C. C. L. C., interrupt prescription.

Quære—Does Art. 2227, C. C. L. C., apply to claims for wrongs as well as to actions for debt?

Semble, that the Crown's liability for the negligence of its servants rest upon statutes passed prior to the Exchequer Court Act 50 & 51 V. c. 16; and that the latter substituted a remedy by petition of right or by a reference to the Court for one formerly existing by a submission of the claim to the official arbitrators, with an appeal to the Exchequer Court, and thence to the Supreme Court of Canada.

COUETTE v. REGINAM.

Maritime law—Salvage—Government vessel—Special contract.

A steamship belonging to the Dominion Government went ashore on the island of Anticosti, and the suppliants rendered assistance with their wrecking steamer in getting her afloat. The services rendered consisted in carrying out one of the stranded steamship's anchors and in taking a hawser and pulling on it until she came off. For carrying out the anchor it was admitted that the suppliants had bargained for compensation at the rate of $50 an hour, but whether the bargain included the other part of the service rendered or not was in dispute. The service was continuous—no circumstances of sudden risk or danger having arisen to render one part of the work more difficult or dangerous than the other.

Held, that the rate of compensation admittedly agreed upon in respect of carrying out the anchor must, under the circumstances, be taken as affording a fair measure of compensation for the entire service.

2. A petition of right will not lie for salvage services rendered to a steamship belonging to the Dominion Government.

[31ST OCTOBER, 1892.

CANADIAN COAL AND COLONIZATION CO. v. REGINAM.

Sale of Dominion lands—Reservation of mines and minerals—The Dominion Lands Act, 43 V. c. 26—Rights of purchaser.

Where the Crown, having authority to sell, agrees to sell and convey public lands, and the contract is not controlled by any law affecting such lands, and there is no stipulation to the contrary, express or implied, the purchaser is entitled to a grant conveying such mines and minerals as pass without express words.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

ARMOUR, C.J.] [8TH NOVEMBER, 1892.

MEWBURN v. MACKELCAN.

Principal and surety—Bond—Payment—Condition precedent—Penalty.

Under a bond conditioned to be void if the person on whose behalf it is given "shall indemnify and save harmless the obligee from payment of all liability of every nature and kind whatsoever" a right of action against the sureties arises in favour of the obligee as soon as judgment is recovered against him on a claim coming within the security. Payment of such claim by him is not a condition precedent.

Boyd v. *Robinson*, 20 O. R. 404, considered.

A bond without a penalty may be good as a covenant or agreement.

Judgment of ARMOUR, C.J., affirmed.

Robinson, Q.C., *Mackelcan*, Q.C., and *Marsh*, Q.C., for the appellants,

Lynch-Staunton and *Ambrose*, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 21ST NOVEMBER, 1892.

In re FORBES v. MICHIGAN CENTRAL R. W. CO.

In re MURPHY v. MICHIGAN CENTRAL R. W. CO.

Prohibition—Division Court—Judge reserving judgment without naming day—R. S. O. c. 51, s. 144—Failure to notify parties of judgment—Prejudice—Waiver.

The County Judge presiding in a Division Court heard two plaints, and in the presence of the agents for the parties, who made no objection, stated his intention of postponing judgment, but did not name a subsequent day and hour for the delivery thereof, as required by R. S. O. c. 51, s. 144. A month later the Judge, without any previous announcement, gave judgment in writing in favour of the plaintiffs, handing it to the agent of the plaintiffs, who delivered it to the clerk of the Division Court. The defendants were not notified by the clerk that judgment had been given till seven weeks later, and till then neither they nor their agent had any knowledge of the judgment. It was then too late to move for a new trial.

Held, that what had happened in this case was just what s. 144 was specially designed to prevent; that the defendants, by reason of their not hearing of the giving of judgment for seven weeks, had lost the opportunity of moving for a new trial, and so were pre-

judiced; and that there had been no such acquiescence in the course taken by the Judge as to deprive them of the right to prohibition.

H. W. Mickle, for the plaintiffs.

H. Symons, for the defendants.

COLEMAN v. CITY OF TORONTO.

Discovery—Examination of officer of municipal corporation—Medical health officer.

In an action for an injunction and damages in respect of the alleged unsanitary condition of a certain bay into which the defendants drained part of their sewage, the plaintiffs sought to examine for discovery the medical health officer of the defendants, whose sole connection with the subject-matter of the action arose from his having made an examination and a report to the local board of health upon the sanitary condition of the bay. The plaintiffs desired to cross-examine upon the report and to have its meaning explained.

Held, that, having regard to the kind of discovery which the plaintiffs desired to obtain from the medical health officer, he was not examinable as an officer of the defendants.

Decision of GALT, C.J., *ante* p. 444; 15 P. R. 27, affirmed.

R. Boultbee, for the plaintiffs.

H. M. Mowat, for the defendants.

[28TH NOVEMBER, 1892.

In re THOMPSON v. HAY.

Prohibition—Division Court—Territorial jurisdiction—R. S. O. c. 51, s. 87—52 V. c. 12, s. 5—Application to transfer cause—Trial of question raised by notice disputing jurisdiction—Refusal of Judge to try.

Where the Judge presiding at the trial of an action in a Division Court declines to try the question of the jurisdiction of the Division Court raised by a notice disputing the jurisdiction, he may be prohibited.

Such question is to be tried at the time and place of the trial of the action; and the defendant is no way bound by anything contained in R. S. O. c. 51, s. 87, as amended by 52 V. c. 12, s. 5, to apply for an order transferring the action to a Division Court having jurisdiction over it, or to apply to the Judge at any other time or place for the trial of the question so raised.

In re Watson v. *Woolverton*, 9 Occ. N. 480, distinguished.

Per FALCONBRIDGE, J., dissenting—The defendant, before coming to the High Court for prohibition, is bound to apply to the County Judge somewhere, either at or before the trial, to transfer the cause; and in this case he did not so apply.

Shepley, Q.C., for the plaintiff.

G. W. Marsh, for the defendant.

[6TH DECEMBER, 1892.

BICKELL v. ROGERS.

Master and servant—Injury to workman by unguarded jointer—Action for negligence—"Defect," meaning of in s. 3 of Workmen's Compensation for Injuries Act, R. S. O. c. 141.

Motion by the plaintiff to set aside a non-suit entered by MACMAHON, J., at the Toronto autumn assizes, 1892, and for a new trial.

Action under the Workmen's Compensation for Injuries Act and the Factories Act by a workman against his employers to recover damages for injuries received by the plaintiff while working at a jointer in the defendants' furniture factory in the city of Toronto, the plaintiff alleging the want of a guard as the cause of the accident by which the injuries were received.

The motion was argued before ARMOUR, C.J., and FALCONBRIDGE, J., on the 6th December, 1892.

MacGregor, for the plaintiff, relied on *Smith* v. *Baker*, [1891] A. C. 325, contending that under it the case should have gone to the jury; and also on *Morgan* v. *Hutchings*, 6 Times L. R. 219; 59 L. J. N. S. Q. B. 197, contending that under it the want of a guard was a "defect in the condition of the ways, works, machinery, or plant" within the meaning of the Workmen's Compensation for Injuries Act, R. S. O. c. 41, s. 3.

Wallace Nesbitt, for the defendants, was not called upon.

THE COURT dismissed the motion with costs, holding that it was bound by its own decision in *Hamilton* v. *Groesbeck*, 19 O. R. 76, affirmed in 18 A. R. 487, to hold that the want of a guard was not a defect; and refusing to follow *Morgan* v. *Hutchings*.

[MACMAHON, J., 17TH OCTOBER, 1892.

ARDILL v. CITIZENS' INS. CO.

ARDILL v. ÆTNA INS. CO.

Fire insurance—Contract for sale of insured building—Change of title—Change material to the risk.

On the 14th March, 1892, the plaintiffs entered into a contract with a firm of contractors for the erection of a brick church, and it was thereby provided that the fabric of the plaintiffs' old frame church and other building material was to become the property of the contractors at a valuation of $525 as a first payment under the contract, and it was further agreed that the contractors were to have "full possession of the premises and old church building, so as they may be able to commence operations on the first day of April next." On the 15th March, 1892, the old church was completely destroyed by fire. At the time of the fire policies of the defendants were in force under which it was insured for $2,400. The plaintiffs, previous to the 1st April, 1892, paid the contractors $150 for any loss they might have sustained by the destruction of the church, and proved their claims against the defendants at about $2,100.

Held, that upon the construction of the building contract, the church was to remain the property of the plaintiffs until the 1st April, 1892, and at the time of the fire there had been no assignment, alienation, sale or transfer, or change of title to the property; and there had been no change material to the risk. The plaintiffs were, therefore, entitled to recover from the defendants the amount of the loss.

S. H. Blake, Q.C., for the plaintiffs.

Osler, Q.C., and *H. H. Collier*, for the defendants.

CHANCERY DIVISION.

[BOYD, C., 29TH SEPTEMBER, 1892.

In re DOUGLAS, KINSEY v. DOUGLAS.

Will—Gift contained in direction to pay—Postponement of enjoyment—Time of vesting.

A testator by his will directed that his estate should be divided upon his youngest child attaining the age of 21 years, the income of the estate in the meantime to be paid to the wife for the benefit of herself and the children. The only gift was contained in the direction to pay and divide upon the arrival of the period of distribution.

Held, that the gifts vested prior to the enjoyment of the corpus of the estate, which was only postponed in order to provide for the maintenance of the family.

Held, also, that the gift vested in each child upon attaining the age of 21, and that no child who did not attain 21 was intended to take a share of the corpus.

W. A. G. Bell, for the plaintiff and the defendant Coffee.

H. S. Osler, for the other defendants.

[12TH NOVEMBER, 1892.

LANGLOIS v. L'ESPERANCE.

Deed—Habendum repugnant to the grant.

Grant of lands to A. and his heirs forever, *habendum* to A. and his wife for their natural lives and the life of the survivor and from and after the death of both to their lawful heirs and assigns.

Held, that A. took in fee simple to the exclusion of the wife.

[24TH NOVEMBER, 1892.

In re RATHBONE AND WHITE.

Vendor and purchaser—Conveyance by all parties interested during life of life tenant—Title—R. S. O. c. 112.

A testator devised his lands to executors and trustees to rent and pay the amount received to his widow for life, and after her death to sell, and divide the proceeds between two sons. One of the sons sold and conveyed all his interest to his brother's wife. During the lifetime of the widow, the trustees, the widow, and the remaining son and his wife, all being *sui juris*, conveyed all their interests to a purchaser.

Held, that the grantee claiming through that conveyance could make a good title.

F. E. Hodgins, for the vendor.

T. C. Thompson, for the purchaser.

[ROBERTSON, J., 16TH NOVEMBER, 1892.

In re TRUSTS CORPORATION OF ONTARIO AND MEDLAND.

Vendor and purchaser—Lands vested in trustee—Execution against cestui que trust—Title.

Lands were conveyed to and held in the name of B., at the instance and for the benefit of A., but without any disclosed trust. Writs of *fi. fa.* lands against A. were placed in the sheriff's hands before A.'s death, but after the conveyance to B.

After the death of A. his administrators sold the lands and offered the purchaser a deed from themselves and one from B.

Upon a petition under the Vendor and Purchaser Act:—

Held, that the purchaser was not bound to carry out the sale unless the writs of *fi. fa.* were removed or released.

D. W. Saunders, for the purchasers.

W. D. Gwynne, for the vendors.

In re VANSICKLE AND MOORE.

Vendor and purchaser—Conveyance to trustees—Power to sell—Power to mortgage implied.

On an application under the Vendor and Purchaser Act it was shown that the equity of redemption in the property in question had been conveyed to trustees to sell and convey, and apply the proceeds on certain notes given to creditors; that foreclosure proceedings had been taken on a prior mortgage and the time for redemption had nearly expired; that to try to save the estate the trustees mortgaged it, and with the proceeds succeeded in staying the foreclosure, getting further time; and that subsequently the mortgage made by the trustees was foreclosed. When the mortgagee attempted to make title through the latter mortgage and foreclosure, it was objected that the trustees had no power to mortgage.

Held, that under the circumstances the trustees were justified in mortgaging, and that in order to save the estate it was right for them to do so, and that the vendor could make title.

F. A. Eddis, for the purchaser.

A. Elliott, for the vendor.

[STREET, J., 24TH SEPTEMBER, 1892.

NASON v. ARMSTRONG.

Vendor and purchaser—Will—Devise—Estate—Condition of sale—Good title—Time within which to raise objection to title—Costs.

A testatrix by her will devised one-half of a lot to her daughter A. P. and the other half to her daughter B. P., and then provided: "And be it understood that if either of my daughters die without lawful issue, the part and portion of the deceased shall revert to the surviving daughter, and in the case of both dying without issue, then I authorize my brother (naming him), the priest of St. Paul's parish, and my executor, to sub-divide the estate amongst my relatives as they shall deem right and equitable in their prudence, justice, and charity."

In an action by a purchaser from the defendants, who claimed through B. P., for specific performance of an agreement for purchase, or, in case they could not make a good title, for a return of the purchase money paid:—

Held, that B. P. took a defeasible estate in fee, with a devise over to A. P. in case B. P. should die leaving no issue at her death; and, as B. P. was still alive, it was impossible to say that a conveyance from her passed a good title.

Little v. *Billings*, 27 Gr. 353, and *Ashbridge* v. *Ashbridge*, 22 O. R. 146, referred to.

Held, also, that notwithstanding a condition in the agreement that the vendee should examine the title at his own expense and have ten days for that purpose, and should be deemed to have waived all objections to title not raised within that time, the vendee was entitled to a good title, and at any time before conveyance was entitled to show that the vendor could not make any title to the lands which the vendee had agreed to purchase.

Held, also, under the circumstances of this case, that the plaintiff had not by his conduct and delay waived his right to object to the title; but as he had not raised the objection in the proper manner and at the proper time, he should get no costs.

E. D. Armour, Q.C., for the plaintiff.

Moss, Q.C., and *J. A. Macdonald*, for the defendants.

[16TH NOVEMBER, 1892.

GRANT v. NORTHERN PACIFIC R. W. CO.

Railway companies—Railway carrying goods through other railways as agents—Loss of goods on agent line—Liability of principal railway company.

Action to recover the value of certain goods.

Evans, the purchaser of the goods in question in British Columbia, having the right to name the mode of transit, arranged with Blackwood, the defendants' agent there, that they should be forwarded by the Grand Trunk Railway and the Chicago and Northwestern Railway, to the defendants' care in St. Paul. The order to this effect having been forwarded by Black-

wood to Belcher, the defendants' agent in Toronto, was by him forwarded to the plaintiffs with a request that they would ship the goods, marked in the prescribed manner, and the plaintiffs did as directed.

Held, that the defendants must be taken to have received the goods by their agents the Grand Trunk Railway Company upon a contract to carry them and deliver them safely to the order of the consignee at Victoria, British Columbia. This contract was broken by their delivering the goods to a person other than the consignee; and the plaintiffs, having thus lost the value of the goods, were clearly entitled to recover.

Thomas Wells and *Wallace Nesbitt*, for the plaintiffs.

Bigelow, Q.C., for the defendants.

COMMON PLEAS DIVISION.

[ROSE, J., 22ND NOVEMBER, 1892.

HARDING v. KNUST.

Costs—Witness and counsel fees—Disallowance—False affidavit of increase.

Upon the taxation of the plaintiff's costs of the action, he was allowed for disbursements of sums of money as witness and counsel fees, upon the usual affidavit of increase made by the plaintiff. The taxation was closed and the certificate thereof issued without objection. Afterwards the defendant discovered that the fees had not been paid to the counsel and witnesses.

Upon motion to a Judge in Court:—

Held, that the fees must be disallowed.

Hornick v. *Romney*, 11 Occ. N. 829, followed.

E. F. B. Johnston, Q.C., for the plaintiff.

W. R. Smyth, for the defendant.

IN CHAMBERS.

[BOYD, C., 23RD NOVEMBER, 1892.

FOURNIER v. HOGARTH.

Security for costs—Plaintiff giving false address—Temporary residence within jurisdiction—Incarceration under criminal sentence.

Where the plaintiff, who for two years previous to the commencement of the action had been a resident of the Province of Quebec, indorsed a false address, within Ontario, upon the writ of summons, for the purpose of misleading and escaping giving security for costs, and was, at the time an application was made therefor, a prisoner in Ontario under a criminal sentence, he was ordered to give security for costs.

Swanzy v. *Swanzy*, 4 K. & J. 287, followed.

Redondo v. *Chaytor*, 4 Q. B. D. 453, commented on.

H. T. Beck, for the plaintiff.

L. G. McCarthy, for the defendant Hogarth.

[GALT, C.J., 4TH NOVEMBER, 1892.

HARDING v. KNUST.

Costs—Taxation—Motion to set aside certificate of taxation—Master in Chambers—Judge in Chambers—Jurisdiction.

Motion by the defendant to set aside the certificate of a taxing officer and to disallow certain items allowed by him, upon taxation of the plaintiff's costs, for payments stated in the plaintiff's affidavit of increase to have been made to witnesses and counsel, upon the ground that the affidavit of increase was false and the payments stated had not been made. The taxation had been closed and the certificate issued without objection. The falsity of the affidavit was afterwards discovered by the defendant.

Held, that neither the Master in Chambers nor a Judge in Chambers had power to entertain the motion.

E. F. B. Johnston, Q.C., for the plaintiff.

W. R. Smyth, for the defendant.

[7TH NOVEMBER, 1892.

MARSH v. WEBB.

Security for costs—Appeal to the Supreme Court of Canada—Delivery out of bond.

Where the plaintiff, being out of the jurisdiction, has filed a bond as security for the defendant's costs of the action, and has succeeded in the Court of first instance and in the Court of Appeal, he is entitled, notwithstanding that the defendant is appealing to the Supreme Court of Canada, to have his bond delivered out to him.

Hamill v. *Lilley*, 3 Times L. R. 549; 56 L. T. N. S. 620, followed.

W. J. Green, for the plaintiffs.

F. L. Webb, for the defendants.

[ROSE, J., 22ND NOVEMBER, 1892.

BERLIN PIANO CO. v. TRUAISCH.

Venue—Change of—Preponderance of convenience—Cause of action—Personal convenience of witnesses.

Upon a motion to change the venue it is necessary to show an overwhelming preponderance of convenience in favour of the change.

Peer v. *North-West Transportation Co.*, 14 P. R. 381, followed.

Where the defendant moved to change the place of trial from Berlin to Belleville, showing that the saving of expense to him if the case were tried at Belleville would be about $40 and that there were two or three more witnesses at Belleville than at Berlin, and the cause of action arose at Belleville; the motion was refused.

Held, that the question whether it would be personally more inconvenient for the plaintiffs' witnesses to go to Belleville or for the defendant's witnesses to go to Berlin, was not one that could be considered.

W. H. P. Clement, for the plaintiffs.

W. H. Blake, for the defendant.

[MEREDITH, J., 6TH DECEMBER, 1892.

In re SOLICITOR.

Appeal—Certificate—Solicitor and client taxation of costs—Report—Court or Chambers.

The certificate of the result of a taxation of a solicitor's bill of costs at the instance of a client, is a report, and, under Rules 848, 849, and 850, the appeal therefrom should be to a Judge in Court upon seven clear days' notice.

W. H. Blake, for the solicitor.

J. B. Pattullo, for the client.

[THE MASTER IN CHAMBERS, 23RD NOVEMBER, 1892.

EMERSON v. HUMPHRIES.

Interpleader—Writ of possession—Adverse claim—Right of sheriff to interplead—Rule 114 (b)—Parties—Infant devisees—Executors—Mortgage action—Claim for possession of land.

In an action upon a mortgage made by a deceased person, who died in 1889, payment, foreclosure, and possession were claimed, and the executors were the only defendants. Judgment for possession, *inter alia*, was recovered, and a writ of possession placed in the sheriff's hands. The widow, who was one of the executors, and the infant children of the deceased mortgagor had an interest under the will in the mortgaged lands, and were in possession when the sheriff attempted to execute the writ. The infants, and the widow as their guardian, made a claim to the possession as against the writ, based on the ground of the infants not having been made parties to the action.

Held, that the sheriff, by virtue of Rule 114 (b), was entitled to interplead.

Held, that the action, as regards the claim for possession, was properly constituted; and the infants were bound by the judgment against the executors.

Keen v. *Codd*, 14 P. R. 182, distinguished.

R. J. Maclennan, for the sheriff.

G. C. Campbell, for the plaintiffs.

Ballantyne, for the defendant Mary Jane Humphries.

F. W. Harcourt, for the infant claimants.

NOVA SCOTIA.

In the Supreme Court.

PERKINS v. IRVINE.

Pleading—Canada Temperance Act—Action against inspector for taking and selling goods—Reply to plea setling up conviction—Duty of party pleading to show facts relied on—Plea struck out as disclosing no reasonable answer—Costs—Order 25, Rule 4.

In an action claiming damages for the alleged wrongful taking and sale of the plaintiff's goods, the defendant pleaded that the acts complained of were done by him as inspector to carry out the provisions of the Canada Temperance Act in the county of Annapolis, and in the enforcement of a conviction of the plaintiff for violation of the Act by the stipendiary magistrate of police district No. 8 in that county. The plaintiff replied, among other things, that "said police district No. 8 was not legally created or confirmed in accordance with the requirements and provisions of sections 1, 2, 3, and 4 of chapter 129 of appendix "A" of the Revised Statutes, 5th series, nor were any of the requirements or provisions of said sections, or of either of them, complied with."

Held, that the plaintiff should have pleaded facts; that the defendant was entitled to know the defects, omissions, or irregularities relied upon.

Held, also, that application to strike out another paragraph of the reply, on the ground that it disclosed no reasonable answer, was properly made under Order 25, Rule 4.

Held, also, that a "reply" is a "pleading," and the proceeding in this case was a conviction and not an order.

PIGEON v. MOORE.

Promissory note—Judgment for plaintiff set aside owing to failure to allege presentment—Costs.

In an action against the defendant, as maker of a promissory note, "payable thirty days after date at the Halifax Banking Company's office, Truro," the plaintiff's solicitor omitted to

allege presentment. At the trial he moved to amend the statement of claim, but the making of the note having been admitted, and a payment on account having been made, the Judge declined to grant the amendment, which was opposed, except upon terms of a continuance; and gave judgment for the plaintiff.

On appeal the judgment for the plaintiff was set aside and a new trial granted.

But as the defendant did not object in law to the statement of claim, when he first pleaded, the costs of appeal were ordered to abide the event.

FULLER v. PEARSON.

Negligence—Escape of steam—Damage to goods.

In an action for damages, found by the trial Judge to have been occasioned to the plaintiffs by the escape of steam or vapour from the defendants' premises, caused by the operation of a steam engine thereon, it appeared that the steam or hot water was discharged on the defendants' own premises from the condenser of their engine, in a place near where the tide ebbed and flowed, and that the plaintiffs' goods, of a kind very liable to rust, were stored in a building twenty feet distant from the place of such discharge, under which the sea flowed and through the floor of which the vapour penetrated.

Held, per McDONALD, C.J., and TOWNSHEND, J., that the plaintiffs were entitled to recover.

WEATHERBE and GRAHAM, JJ., contra.

PEOPLE'S BANK v. JOHNSON.

Bond—Illegal consideration—Agreement to stifle criminal prosecution.

The defendant was sued on a bond, by which he bound himself to make good any deficiency arising after the plaintiffs had realized on a preferential assignment made by Locke to the bank, of which he was cashier at Lockport, and from which he had embezzled $17,000. The defence was that the defendant

had been induced to sign the bond to prevent Locke from being criminally prosecuted for the embezzlement. The trial Judge found that, even if there had been a threat to prosecute, it had not so operated on the defendant's mind as to destroy his free agency.

Per McDONALD, C.J., and WEATHERBE, J., that the trial Judge had left undecided the crucial point of the case as to the alleged threat.

Per McDONALD, C.J., WEATHERBE and TOWNSHEND, JJ., that the evidence disclosed an agreement to stifle a criminal prosecution and the bond was invalid.

COLLINS v. CUNNINGHAM.

Parties—Mortgage action—Redemption by one not a party.

An order of foreclosure and sale was made under certain mortgages made by the defendants' testator to the plaintiff's testator. Subsequently to the mortgage, M. J. Sheraton, without notice or knowledge of the mortgagees, became a lessee of the property and expended a large amount of money in improvements, and on her application, *ex parte*, an order was made that upon payment of the amount for which the mortgages were foreclosed, the property should be conveyed to her appointees. On a motion to rescind this order, on the ground, among others, that Mrs. Sheraton was not a party to the foreclosure suit, the Judge refused to rescind but amended the order by making her a party, and afterwards made an order for the sale of the premises subject to the lease, amending the original order of foreclosure and sale and authorizing a sale thereunder.

Held, that the appeal from the first order should be allowed, and that from the second order should be dismissed.

WEATHERBE, J., doubted as to the second order.

TOWNSHEND, J., dissenting, held that both appeals should be dismissed.

LEAMAN v. MURRAY.

Infant—Proof of infancy—Application to set aside judgment entered on warrant to confess, on ground of infancy—Admissibility of affidavit—Order 51, Rule 5.

Application was made to the Judge of a County Court to set aside a judgment entered against one of the defendants and the warrant to confess under which it was entered, on the ground that the defendant was under age when the warrant to confess was given. The application was supported by an affidavit of the defendant stating the date of his birth, and the day on which he was 21 years of age. The Judge declined to receive this affidavit as sufficient proof, and, before any order was made, affidavits from the defendant's mother and uncle were tendered. These were also rejected.

Held, per TOWNSHEND, J., and GRAHAM, E.J., that the defendant's affidavit was sufficient proof of the fact of infancy.

Per TOWNSHEND, J., that the additional affidavits, under the circumstances, should have been received.

Per RITCHIE, J., that the Judge below came to a right decision on the facts before him, and that if the defendants wished to question his right to refuse to receive the additional affidavits they should have appealed from that decision; but that, the proceeding being an interlocutory one, the affidavits, under Order 51, Rule 5, should be permitted to be read in the appellate Court on payment of costs below, and that the plaintiff should have time to file affidavits in reply.

Per WEATHERBE, J., that the affidavit establishing infancy could not be read.

SYDNEY AND LOUISBURG COAL AND RAILWAY CO. v. KIMBER.

Arrest—Affidavit for—Statement of cause of action—"Fear" not equivalent to "belief" that debt will be lost—Place must be shown on face of order.

An affidavit for order to arrest merely setting out that the defendant is indebted to the plaintiff in a sum named does not disclose a good cause of action. It is also bad if it sets out that the plaintiff "fears" the debt will be lost, the statute requiring an affidavit that the plaintiff believes the debt will be lost, but

both objections come within Order 68, Rules 1 and 2, and will not be entertained after unreasonable delay.

The order for arrest was "dated the 3rd day of January, 1889," no place being named in the date, except that the Commissioner signed as "Commissioner [&c.] for the County of Cape Breton," but the order was indorsed "dated at Sydney, &c."

Held, bad, in that it did not show jurisdiction, the indorsement being no part of the order; WEATHERBE, J., dissenting.

LYONS v. DONKIN.

Bill of exchange—Consideration for acceptance—Forbearance.

The defendant was indebted to S., who placed the claim in the plaintiffs' hands for collection. The plaintiffs, after pressing the defendant for a settlement of the claim, drew on the defendant, at his request, at thirty days, for the amount.

Held, that the forbearance for thirty days was consideration for the acceptance, and, in the absence of evidence negativing the plaintiffs' authority to bind the creditor to that forbearance, it would be presumed that the plaintiffs had authority, and that the agreement to forbear was binding on the plaintiffs' client.

In re GREENWOOD.

Mistake—Acquiescence—Rule of Court.

The Court refused to open up a rule, alleged to have been made under a mistake, which had been acquiesced in for seven years.

PERKINS v. IRVINE.

Stay of proceedings—Notice.

An application for a stay of proceedings can only be made on notice to the other party.

REGINA v. CHURCH.

Forfeiture of areas—Notice—Certiorari to Commissioner of Mines.

The Commissioner of Works and Mines, on non-payment of one of the sums annually payable by the lessee of coal areas, declared and decreed the lease forfeited, without notice to the lessees.

Held, that the forfeiture could not be decreed without notice, and that *certiorari* would lie to him to bring up the proceedings.

Quære, per WEATHERBE and GRAHAM, JJ., whether the Commissioner in forfeiting the areas was acting as a Judge or as a landlord, but they concurred in the result.

PEERS v. ELLIOTT.

Negligence—Absence of spark arrester—Misdirection.

In an action for damages by fire, resulting from the use of an engine in pressing hay, the jury was instructed that the absence of a spark arrester would, in itself, be negligence, for which the defendants would be liable. The jury, in answer to a question, found that the defendants, in the use of the engine, did not take all such reasonable precautions as prudent men should have done.

Held, that there was a misdirection calculated to mislead the jury and affect their answer to the question put to them, and the case did not come within Order 37, Rule 6; GRAHAM, E.J., dissenting.

McBEATH v. SINCLAIR.

New trial—Abortive trial when only one question out of several answered by jury—Findings must be got rid of before second trial—Time extended to move for new trial—Objection to short notice not insisted on—Waiver.

The jury answered one of four questions and as to the others stated that they could not agree. No judgment was entered and no application made for a new trial, but the plaintiff, ignoring the first finding, set down the case for trial at the subsequent term. The Judge refused to try it but made an order extending the time for giving notice of application for a new trial.

Held, that the Judge was right in not trying the cause till the finding was got rid of and that the discretion to extend the time was properly exercised.

Notice of an application was not given two clear days before motion, but on the day for which notice was given, the solicitors met and by agreement adjourned for a week. At the hearing the defendant's solicitor raised the objection that the original notice was short, but did not insist on it, and it was considered withdrawn.

Held, that the defendant was precluded from renewing the objection before the appellate Court, as if it had been insisted on the application might have been dismissed and leave obtained to serve another notice.

REGINA v. CHETWYND.

Evidence—Order for examination of witnesses out of jurisdiction in criminal case.

An order was made under 53 V. c. 37, s. 23 (D.) for the examination in Boston of witnesses on behalf of the Crown residing out of Canada, and that the evidence so taken should be read before the grand jury.

Held, that the order was valid so far as it related to the taking of the evidence.

Held, per RITCHIE and MEAGHER, JJ., that the order should not have directed that the evidence be read before the grand jury, they having the right to decide for themselves upon what evidence they should find a bill.

Per WEATHERBE, J., that the evidence should be taken here.

LAURIE v. CROUCHER.

Warranty—Goods sold and delivered—Evidence—Findings of jury—New trial—Counter-claim—Costs.

In an action for goods sold and delivered the defendant relied upon an implied warranty as to quality. The evidence showed that, before purchasing, the defendant inspected the goods, and in buying relied upon his own judgment. The jury having found against the plea of warranty, the Court refused to disturb their finding.

The defendant counter-claimed for hay not delivered, which, on account of its condition, he refused to accept. The jury, in estimating the plaintiff's damages, awarded him only the value of hay actually delivered.

Held, that this measure of success did not entitle the defendant to costs.

POWELL v. SMITH.

New trial—Evidence not clear.

In an action for goods furnished to the defendant's wife and children and consumed by the family, the County Court Judge gave judgment for the plaintiff. The evidence showed that the defendant had published a notice in the newspapers forbidding credit to his wife, and that he gave all his earnings to his wife, but it did not appear whether this state of things existed during the period when the goods were bought; and a new trial was granted to remove the uncertainty.

THOMSON v. THOMAS.

Trespass—Possessory title—Evidence—New trial.

Finding of trial Judge in an action of trespass that plaintiff had no possession or possessory title, reversed on the evidence and new trial granted; RITCHIE, J., dissenting.

ROBIN v. HART.

Trade-mark—Words sufficient to pass—Assignment of property—Costs of unfounded charges of fraud.

An assignment was made including, *inter alia*, all that concern or business carried on under the style and firm of R. & Co., and all merchandize, effects, and premises, and all whatsoever may appertain or belong to the same or any part thereof. The good-will was also in terms included.

Held, that the words were sufficient to include a registered trade-mark used in the business.

The trade-mark was improperly used by the defendant, but the trial Judge found that it had not been fraudulently used, as charged in the statement of claim.

Held, that the judgment in favour of the plaintiff should be varied so as to give the defendants the costs of the issues of fraud found in their favour; no costs of the appeal to either party; MCDONALD, C.J., dissenting.

SMITH v. HORTON.

Judgment by default—Opening up—Judgment to stand as security—Costs.

Where the Court was of opinion that, on the materials before the Court below, judgment by default for the plaintiff should have been opened up and the defendant permitted to appear and plead, but no breach of faith had been committed by the plaintiff in entering the judgment, the defendant was permitted to appear and plead, but the judgment allowed to stand as security. Costs to abide the event.

Quære, per RITCHIE, J., whether final judgment can be entered on default for taxable costs before they have been taxed.

GILLIES v. McDONALD.

Judgment by default—Interlocutory judgment—Extending statement of claim beyond indorsement—Does not apply where no appearance—Irregular judgment—Notice of motion—Objection to regularity of.

A summons to set aside a judgment by default for the plaintiff was returnable on the 27th June, and the plaintiff thinking it was for Thursday 21st June, (the figure being as much like a "7" as a "1," Thursday not being the 21st, and the 21st not giving the requisite time,) instructed his agents to move to dismiss the summons for irregularity.

Held, that after so moving and failing he could not apply to the discretion of the Court to allow him to oppose the application with further material.

The writ of summons was indorsed "for seizing and levying on personal property on an execution issued on a judgment which was set aside, and for money collected on said execution." No amount was mentioned for damages or for the amount collected. Default was marked for want of appearance and pleas,

and afterwards on the same day the defendant tendered an appearance and demand of statement of claim which the plaintiff refused to receive. Afterwards the plaintiff filed a statement of claim, including damages on breach of a contract to indemnify the plaintiff on proceedings under the execution, and on the same day entered a final judgment, including interest.

Held, that the default so marked was not an interlocutory judgment; that appearance and demand of statement of claim were therefore in time; that even if they were not in time the plaintiff could not, on default of appearance, extend his statement of claim beyond the indorsement on the writ.

HART v. SCOTT.

Evidence—Ejectment—Oral agreement respecting land—Amendment after trial.

At the trial of an action for the recovery of a barn, the plaintiff proved a deed conveying the property to him from his brother, but the defendant proved an agreement under which the grantor was to have the use of the premises as long as he lived and the plaintiff to erect a dwelling house thereon, which agreement was partly performed, the defendant remaining in possession for some time and using the barn. The learned Judge after the trial was over, and without hearing the plaintiff, permitted an amendment to let in the defence under the agreement which had not been pleaded.

Held, per RITCHIE and TOWNSHEND. JJ., that the evidence was properly received and considered, and that the plaintiff could not recover.

Per WEATHERBE and GRAHAM, JJ., that the amendment was improperly made.

In re OVENS.

Mineral lands—Application for prospecting license—Definiteness of description—Shape of areas—Shape of block.

A description in an application for a prospecting license is sufficiently definite which describes the areas by numbers as designed on a plan in the office.

The areas need not be collectively laid off in a quadrilateral figure, but the block of areas over which the license extends must consist of areas laid off in quadrilateral figures as defined in the statute, and this provision, as well as that which provides that no application shall be received for areas already applied for, etc., is not merely directory but imperative.

SEYMOUR v. DOULL.

Evidence—Order for examination of witnesses—Consent—Interrogatories.

An order was taken on affidavit and by consent, in the usual form, for the examination of witnesses. Under this order interrogatories were administered to the witnesses, which a Judge in Chambers refused to set aside.

Held, that the witnesses could not be examined under this order, nor without an express order on special cause shown.

REGINA v. GRANT.

Certiorari—Jurisdiction of Commissioner abolished.

Since the adoption of the Crown Rules, 1891, *certiorari* cannot be allowed by a commissioner.

AUSTEN v. BERTRAM.

Award—Application to remit back—Grounds of motion to be stated—Jurisdiction of Judge at Chambers.

Application to a Judge at Chambers to remit an award back to arbitrators, held to have been properly dismissed, where the application was by summons and no grounds were stated and no affidavits served on the opposite party.

Per GRAHAM, E.J.—The reference not being compulsory, a Judge at Chambers had no power to set aside the award.

SMITH v. NICHOL.

Judgment—Confession of—Warrant—Fraud—Burden of proof—Void or voidable—Election to avoid.

On an application to set aside a warrant to confess judgment as having been obtained by false representations, it appeared that the defendant was a woman in business, not illiterate and not in distress. The evidence was conflicting as to any misrepresentation or imposition, and as the burden of proof was on the defendant, the Court declined to set aside the warrant.

Per RITCHIE, J.—Even assuming the warrant to have been obtained by fraud, it was only voidable, and the defendant had not elected to avoid it when she discovered its nature.

McDONNELL v. McISAAC.

Statutes—5 Geo. II. c. 7, in force in Nova Scotia—Administration of real estate.

The Imperial statute 5 Geo. II. c. 7, authorizing the sale of lands in equity for the payment of debts in British colonies, is in force in this province.

MANITOBA.

In the Queen's Bench.

[TAYLOR, C.J., 22ND NOVEMBER, 1892.

GRAHAM v. HAMILTON.

Real Property Act—Application to stay proceedings for non-payment of costs of former suits over same matter.

This was a proceeding under the Real Property Act. Mrs. Hamilton applied to bring a parcel of land under the Act, and Graham filed a *caveat*, following that up with a petition in due course. On the hearing of the petition the respondent contended that the petitioner was not entitled to proceed because the costs of certain former proceedings had not been paid, and that in consequence, the petition should be dismissed, or proceedings stayed until payment of these costs. There was no dispute as to the facts. Some years ago a person through whom the respondent derived title filed a bill to foreclose a mortgage, the petitioner being the defendant. The bill was taken *pro confesso* against him, decree made, account taken, and Master's report made. Then he presented a petition to have the note *pro confesso* set aside, the decree and all subsequent proceedings vacated, and to be allowed to answer and defend the suit. This petition was dismissed with costs, on the ground that the delay on the part of the petitioner had not been accounted for.

In that petition the petitioner sought to be allowed to defend, in order that he might, among other things, set up a claim to cross-relief in respect to an alleged lien for certain unpaid purchase money. After the dismissal of that petition the petitioner filed a bill setting up the same alleged lien. In this suit an order was made staying proceedings, limiting a time for payment of the costs on the dismissed petition, and providing for dismissal of the bill in default of payment within the time limited. Default having been made, the bill was dismissed

with costs. The costs on these two proceedings were the costs for non-payment of which the respondent sought to have the petition dismissed.

The claim set up by the petition was in respect of the same alleged lien brought forward upon the application for leave to defend made in the foreclosure suit, and in respect of which the bill was afterwards filed.

Held, that this was a proceeding in the Land Titles Office, not an action in the Court of Queen's Bench. The Court has not jurisdiction to stay a proceeding which arises out of an application made in that office under the Real Property Act, because costs of an action or suit in the Court have not been paid.

The bill filed was dismissed for non-payment of costs, not on the merits, so that could not bar the petitioner.

As to the point of laches on the part of the petitioner, until the Statute of Limitations barred the claim, delay in enforcing it could not be made a ground for the Court refusing relief.

Order made for an issue.

Aikins, Q.C., for Hamilton.

C. P. Wilson, for Graham.

[DUBUC, J., 19TH NOVEMBER, 1892.

LONG v. WINNIPEG JEWELLERY CO.

Discovery—Examination of officer of corporation—Striking out defence of defendant corporation—Cross-examination on affidavit used on another application.

The plaintiff sued the defendants, specially indorsing their writ of summons under the Bills of Exchange Act. The defendants filed an affidavit of their president, W. F. Doll, and obtained an order for leave to defend.

The plaintiff then, on an *ex parte* application, obtained an order from the referee to examine Doll on his affidavit, stating he proposed to make a motion to set aside the order for leave to defend. Doll refused to attend on the examination under this order, whereupon the plaintiff took out a summons to show cause why the defence of the defendants should not be struck out under R. S. M. c. 1, s. 43, or why the order granting leave to appear should not be set aside on the merits. The second part of this summons was not argued. The referee made an order directing that Doll attend to be examined at his own expense, or in default that the appearance of the defendants be struck out. The defendants appealed, contending that the affidavit of Doll, on which leave to defend had been granted, had answered its purpose, and that there was no motion pending on which the affidavit had been used; further, that the Court would not strike out an appearance of a defendant corporation on default of one of its officers in complying with an order requiring his attendance for examination: R. S. M. c. 1, s. 43.

Held, that there was no motion, application, or proceeding pending before the Court, in which the affidavit of Doll was being or could be used, or was actually questioned. If the plaintiff, instead of applying for an *ex parte* order to examine, had taken out a summons to rescind the order allowing leave to appear, or to strike out the appearance, the matter would have been different; the affidavit might then be considered to be in a proceeding pending before the Court.

Held, further, that the provisions of s. 43 of the Administration of Justice Act, R. S. M. c. 1, clearly include a corporation.

Culver, Q.C., for the plaintiff.

Hough, for the defendant.

[KILLAM, J., 22ND NOVEMBER, 1892.

In re MUNICIPALITY OF SOUTH NORFOLK v. WARREN.

County Court—Jurisdiction—Action for taxes—Question of title to land—Taxation of interests in unpatented Crown lands—Prohibition.

This was an application by a defendant in an action brought against him in a County Court by a rural municipality, to prohibit further proceedings in the action. The claim was for taxes

on a half section of land for the years 1888, 1889, 1890, and 1891, and interest. The defendant entered a dispute note, whereby he denied liability, on the ground that he was not the owner of the land in question before the year 1891, and that previously to 16th October, 1890, the land was Crown land, the property of the Dominion of Canada, and exempt from taxation; the land on the last mentioned date having been purchased from the Crown by Duncan McArthur. The defendant also disputed the jurisdiction of the County Court to try the action so far as it related to taxes accrued before the year 1891, on the ground that the title to the land was in question. He paid into Court the amount claimed for taxes for 1891. The action came on for trial on 10th June, 1892, and counsel for the defendant objected at the outset to the jurisdiction of the Court. The Judge of the County Court, however, proceeded with the trial.

For the plaintiffs the assessment and collection rolls for the various years were produced and put in evidence. In the assessment rolls the defendant was assessed as owner of the land mentioned; and in the collection rolls his name appeared in columns headed "Owner or Tenant," but without anything to distinguish in which capacity he was assessed. The defendant stated he took up the land in 1882 as a homestead and pre-emption; he paid the taxes from 1882 to 1887; his entry was cancelled in 1890; that the Government allowed him to nominate a purchaser; he nominated McArthur, and letters patent were issued to him on 31st October, 1890; and that he had repaid McArthur and was then, at the time of the trial, the owner of the land.

It was contended on behalf of the plaintiffs that the assessment rolls were conclusive evidence of the defendant's liability for assessment in respect of the land; while for the defendant it was argued that until the issue of the letters patent granting the lands, they were not assessable, and that the inquiry as to the fact involved the trial of the question of title.

The County Court Judge held that the assessment rolls were not conclusive upon the question of exemption, but that lands of the Crown held under homestead or pre-emption entry were assessable as against the person so holding, under R. S. M. c. 101, s. 5, and the corresponding prior enactments; that the mode of describing the defendant in the assessment roll, whether

as owner or otherwise, was immaterial to his liability; and that, as the defendant admitted his homestead and pre-emption entry no question of title was in dispute.

Held, that the County Court Judge was right in so holding upon all these points.

The Judge originally, and the Court on motion for prohibition, must inquire into the matter, and ascertain whether the liability of the defendant is contingent upon the decision of a question of title upon which there is a real dispute. Here the defendant did not upon the trial show that he disputed the fact that he had made a homestead and pre-emption entry in respect of the land. The real defence that he intended to insist upon was that the lands had never been formally granted by the Crown until October, 1890, and that previously thereto, notwithstanding any purchase or entry by him in respect of them, the lands were not liable to assessment, and he was not liable for taxes imposed in respect of them.

If any interest had been granted by the Crown in the lands, taxation of that interest is not taxation of the property of Canada.

A reference to the Dominion Lands Acts will show that parties acquire interests in lands by homestead and pre-emption entries, and the decision in *Rural Municipality of Cornwallis* v. *Canadian Pacific R. W. Co.*, 19 S. C. R. 702, appears to involve the conclusion that such statutory interests are recognizable by Courts of law, although not granted by letters patent; there seems no reason why such an interest should not be subject to taxation.

In this case there was no question of the homestead and pre-emption entry to try. The fact of occupancy or non-occupancy at a particular time could not be deemed a question of title. It was open for the Judge of the County Court to determine whether the defendant in fact occupied the lands, although without title, and whether the defendant was so assessed as to be liable. This Court could only prohibit, if the defendant could not be held liable without trying the question of title. It would appear that this might have been properly done, and the rule must, therefore, be discharged with costs.

Colin H. Campbell, for the plaintiffs.

J. H. Munson, for the defendant.

[1st December, 1892.

In re BRANDON PROVINCIAL ELECTION.

Manitoba Controverted Elections Act—Preliminary objections—Application to dismiss same.

This was an application by way of a summons calling on the respondent in an election petition to show cause why the preliminary objections should not be dismissed and discharged because no summons or appointment had been issued or served for the disposition of such preliminary objections or to show cause why, in the event of said presiding Judge being of opinion that such an order should not be made, a time should not be fixed for the hearing, determining, and disposing of said preliminary objections.

The petition was one presented under the Manitoba Controverted Elections Act, R. S. M. c. 29, contesting the return of the respondent as a member of the Provincial Legislature. The petition was presented on 15th September, 1892, and was served on 17th September. On 21st September the respondent filed certain preliminary objections, and no summons for the hearing thereof had been taken out.

By the 37th section of the Manitoba Controverted Elections Act, "within five days after the service of the petition . . . the respondent may produce in writing any preliminary objections," etc. And by the 38th section, "the Judge shall then hear the parties upon such objections and grounds and shall decide the same in a summary manner."

Held, that there was no ground for calling on the respondent to show cause why a time should not be fixed for hearing the preliminary objections. It might not be unreasonable under the circumstances found in this case to give notice to the respondent of an intended application for an appointment to hear and dispose of the preliminary objections, but such was not the form of the summons; and at any rate the addition of such, if no objection were made to the appointment, could not well operate to deprive the respondent of the costs of showing cause to the main part of the summons.

Here the respondent made no objection to such an appointment, but claimed merely that it was unnecessary to call on him to show cause against it.

While, then, if the petitioner so desired, a time might be fixed for hearing the objections, the summons must be discharged with costs, to be costs in the petition to the respondent in any event.

C. P. Wilson, for the petitioner.

Aikins, Q.C., and *Colin H. Campbell*, for the respondent.

[BAIN, J., 14TH NOVEMBER, 1892.

FRENCH v. MARTIN.

Attachment of debts—Order for—Affidavit—No statement that garnishee within the jurisdiction.

The plaintiff having recovered judgment against the defendants, obtained an order on 26th July, 1892, attaching all debts due and owing to the defendant from one Graybourn as the clerk of the Executive Council of the Province of Manitoba.

On 26th October, 1892, the defendant obtained a summons in the referee's Chambers to set aside the order, on the ground that the affidavit on which it was made did not state that the person in whose hands the money was to be attached, "is within the jurisdiction of the Court."

On the return of the summons the referee dismissed it, holding that by the delay in moving any defects in the order had been waived.

The defendant appealed, contending that the directions in section 8 of the Garnishment Act, R. S. M. c. 64, as to what the affidavit for a garnishing order shall state, are imperative, and that an order issued on the defective affidavit in this case was a nullity.

Held, that the order issued on the affidavit was a nullity, and should be set aside. The total omission of the statement that the garnishee was within the jurisdiction, or of some express statement to the same effect, was a fatal defect.

Monkman, for the plaintiff.

Darley, for the defendant.

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NOTE:—Where a page only is mentioned, the reference is to the CANADIAN LAW TIMES Occasional Notes for 1892.

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